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Citations to decisions below

None.

Jurisdiction

(i) Date Judgment Entered

30 June 2005 [+90: 28 September 2005]

(ii) Rehearing, Extension None

(iii) Rule 12.5 Cross-appeal N/A

(iv) Statutes, Jurisdiction

Review by certiorari of decision by court of appeals, 28 U.S.C. §§ 1254(1), 2101(c).

(v) Regarding notice of statutory challenge, Rule 29.4(b)

By supplement on appeal, Tello challenged TEX. CODE CRIM. PROC. ANN. § 42.12 §§ 1, 5(b),¹ 9A, 11, 13B and 21, on appeal and gave notice. Tello also challenged TEX. OCC. CODE ANN. §§ 109.051 to 109.053 as violating 42 U.S.C.A. §§ 1320d-6, 1320d-7 & 1395x (West 2003) ("HIPAA"). Tello's motion to supplement on appeal was denied.

Therefore, "28 U.S.C. § 2403(a) may apply." The initial filing in this proceeding has been served on the Solicitor General, and, the original Notice of Statutory Challenge was served upon all of the Attorney General for STATE OF TEXAS, the Attorney General for UNITED STATES OF AMERICA and the United States Attorney for the Northern District of Texas.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

¹ Sections 10(c) and 12(c), included here, are very similar to §§ 5(b), 21(a) and 21(b) in promoting arrest for mere breach.

Key Terms of "Community Supervision"

- IT IS THEREFORE ORDERED by the Court that the Defendant, JOHN THOMAS TELLO, be and is hereby placed on Community Supervision for a term of FIVE (5) years beginning on this date under the supervision of the Court ... subject to the following conditions of community supervision, ...
- and further, the Defendant is ORDERED that during the term of community supervision he/she shall: ...
- (6) *Work faithfully at suitable employment* as far as possible, subject to the approval of the Court and/or Community Supervision Officer;
- (7) *Do not change employment* or place of residence *without* the *permission* of the Court and/or Community Supervision Officer[.] [A-8, -12] (emphasis added).
- [through (21) and the attachment] Register [your residence] with your local municipal or county law enforcement agency as a sex offender within seven (7) days. [A-17].
- [also through (21) and the attachment] Submit to a clinical assessment and treatment program with a registered sex offender treatment provider [SOTP] (including but not limited to a psychological, psychiatric, psychophysiological testing, and/or group and individual therapy) to wit; _____ or as designated by the adult supervision officer in charge of your case within 60 days from the date of this judgment and pay all costs of said program and testing. Participate in good faith in the assessment and treatment program, attend all sessions and successfully complete the sex offender [treatment] program [a/k/a SOTP]. [A-17].
- [also through (21) and the attachment] Do not go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility,

playground, public or private youth center, public swimming pool or video arcade facility. [A-18].

Key Statutory Language—Question 1

Texas Code of Criminal Procedure

ART. 38.03. [705] [785] [765] PRESUMPTION OF INNOCENCE

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved *beyond a reasonable doubt*. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

TEX. CODE CRIM. PROC. ANN. art. 38.03 (West 1979 & Supp. 2004-2005) (Ch. 38—Evidence in Criminal Actions) (emphasis added).

Texas Penal Code

§ 2.01. PROOF BEYOND A REASONABLE DOUBT.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved *beyond a reasonable doubt*. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

TEX. PENAL CODE ANN. § 2.01 (West 2003) (Ch. 2—Burden of Proof) (emphasis added).

Key Statutory Language—Question 2

Texas Code of Criminal Procedure, Art. 42.12

SEC. 1. PURPOSE

It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, ***the conditions of community supervision***, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest.

Art. 42.12 § 1 (separation of powers violation; terms and conditions for “supervision” are 100% *judicial*; thus, legally impossible to be *criminal*, where a crime is defined only by legislative act, i.e., not by judicial act/fiat on a case-by-case basis) (emphasis added).

SEC. 5. DEFERRED ADJUDICATION; COMMUNITY SUPERVISION

(b) ***On violation of a condition of community supervision*** imposed under Subsection (a) of this section, ***the defendant may be arrested and detained as provided in Section 21 of this article***. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all

proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred. A court assessing punishment after an adjudication of guilt of a defendant charged with a state jail felony may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed, regardless of whether the defendant has previously been convicted of a felony.

Art. 42.12 § 5(b) (separation of powers violation; alleged violation of judicial-act-/fiat-defined "supervision" justifies arrest, regardless of whether the alleged violation is criminal or non-criminal conduct) (emphasis added). *See also* §§ 10(c), 12(c), 21(a) and 21(b).

SEC. 10. AUTHORITY TO IMPOSE, MODIFY, OR REVOKE COMMUNITY SUPERVISION

(c) *Any judge of a court having geographical jurisdiction where the defendant is residing or **where a violation of the conditions of community supervision occurs may issue a warrant for his arrest**, but the determination of action to be taken after arrest shall be only by the judge of the court having jurisdiction of the case at the time the action is taken.*

Art. 42.12 § 10(c) (separation of powers violation; alleged violation of judicial-act-/fiat-defined "supervision" justifies arrest, regardless of whether alleged violation is criminal or non-criminal conduct) (emphasis added).

SEC. 11. BASIC CONDITIONS OF COMMUNITY SUPERVISION

(a) *The judge of the court having jurisdiction of the case shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. Conditions of community supervision may include, but shall not be limited to, the conditions that the defendant shall:*

(1) Commit no offense against the laws of this State or of any other State or of the United States;

(2) Avoid injurious or vicious habits;

(3) Avoid persons or places of disreputable or harmful character;

(4) Report to the supervision officer as directed by the judge or supervision officer and obey all rules and regulations of the community supervision and corrections department;

(5) Permit the supervision officer to visit him at his home or elsewhere;

(6) *Work faithfully at suitable employment as far as possible;*

(7) *Remain within a specified place;*

(8) Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums;

(9) Support his dependents;

(10) Participate, for a time specified by the judge in any community-based program, including a community-service work program under Section 16 of this article;

(11) Reimburse the county in which the prosecution was instituted for compensation paid to

appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender;

(12) Remain under custodial supervision in a community corrections facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

(13) Pay a percentage of his income to his dependents for their support while under custodial supervision in a community corrections facility;

(14) Submit to testing for alcohol or controlled substances;

(15) Attend counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse;

(16) With the consent of the victim of a misdemeanor offense or of any offense under Title 7, Penal Code, participate in victim-defendant mediation;

(17) Submit to electronic monitoring;

(18) Reimburse the general revenue fund for any amounts paid from that fund to a victim, as defined by Article 56.01 of this code, of the defendant's offense or if no reimbursement is required, make one payment to the fund in an amount not to exceed \$50 if the offense is a misdemeanor or not to exceed \$100 if the offense is a felony;

(19) Reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense;

(20) Pay all or part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense or for counseling and education relating to acquired immune

deficiency syndrome or human immunodeficiency virus made necessary by the offense;

(21) Make one payment in an amount not to exceed \$50 to a crime stoppers organization as defined by Section 414.001, Government Code, and as certified by the Crime Stoppers Advisory Council;

(22) Submit a blood sample or other specimen to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record of the defendant; and

(23) In any manner required by the judge, provide public notice of the offense for which the defendant was placed on community supervision in the county in which the offense was committed.

Art. 42.12 § 11(a) (separation of powers violation; these standard terms and conditions for supervision are 99% non-criminal, 100% judicial and 100% discretionary) (emphasis added).

(i) A judge who grants community supervision to a sex offender evaluated under Section 9A may require the sex offender as a condition of community supervision to submit to treatment, specialized supervision, or rehabilitation according to offense-specific standards of practice adopted by the Council on Sex Offender Treatment. On a finding that the defendant is financially able to make payment, the judge shall require the defendant to pay all or part of the reasonable and necessary costs of the treatment, supervision, or rehabilitation.

Art. 42.12 § 11(i) (SOTP is fine, but this language creates major conflicts, with both statutes and rights). Cf. TEX. OCC. CODE ANN. §§ 109.051 to 109.053; 42 U.S.C.A. §§ 1320d-6, 1320d-7 & 1395x ("HIPAA").

SEC. 12. CONFINEMENT AS A CONDITION OF COMMUNITY SUPERVISION

(c) A judge may impose **confinement** as a condition of *community supervision* under Subsection (a) of this section on placing the defendant on supervision or **at any time during the supervision period**. The judge may impose periods of confinement as a condition of community supervision in increments smaller than the maximum periods provided by Subsection (a) of this section but may not impose periods of confinement that if added together exceed the maximum periods provided by Subsection (a).

Art. 42.12 § 12(c) (separation of powers violation; judge may incarcerate at will, in 100% discretion, with or without criminal conduct as basis) (emphasis added).

SEC. 13B. DEFENDANTS PLACED ON COMMUNITY SUPERVISION FOR SEXUAL OFFENSES AGAINST CHILDREN

(a) If a judge grants community supervision to a defendant described by Subsection (b) and the judge determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, the judge shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant:

(2) attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as *specified* by or approved by the judge or the community supervision and corrections department officer supervising the defendant.

Art. 42.12 § 13B(a)(2) (SOTP is fine, but this language

creates major conflicts, with both statutes and rights) (emphasis added). Cf. TEX. OCC. CODE ANN. §§ 109.051 to 109.053; 42 U.S.C.A. §§ 1320d-6, 1320d-7 & 1395x ("HIPAA"). What does *specify* mean? See, *infra*, § 13B(c).

(c) A community supervision and corrections department officer who under Subsection (a)(2) *specifies* a sex offender treatment provider to provide counseling to a defendant shall contact the provider before the defendant is released, establish the date, time, and place of the first session between the defendant and the provider, and request the provider to immediately notify the officer if the defendant fails to attend the first session or any subsequent scheduled session.

Art. 42.12 § 13B(c) (What does *specify* mean? See also § 13B(a)(2). It's very clear that the authors of this system never remotely contemplated pre-trial, self-initiated SOTP. Here, *specify* means that NILES-JONES (the probation officer certified to handle sex-offense cases) may (1) tortiously interfere with already on-going counseling, (2) act as **medical services provider**, thus (3) make "**treatment decisions**," compelling the probationer to obtain treatment from a specific SOTP counselor [even HMO's offer a choice! cf. Art. 42.12 § 14(c) (78th Leg. ch. 353) (probationer to give notice of which counselor chosen and when started in treatment)], i.e., (4) conduct herself as if she had a license to practice medicine, where no such license exists, thus, and ultimately, and simultaneously, (5) be a "source" of "**treatment information**" that then may/must be passed along to law enforcement, thus animating diametrically conflicting ethical positions (doctor, law enforcement). See TEX. OCC. CODE ANN. §§ 109.051 to 109.053. But cf. HIPAA (probation officer nowhere identified as a **medicial services provider**)) (emphasis added).

SEC. 21. VIOLATION OF COMMUNITY SUPERVISION:
DETENTION AND HEARING

(a) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause a defendant convicted under Section 43.02, Penal Code, or under Chapter 481, Health and Safety Code, or Sections 485.031 through 485.035, Health and Safety Code, or placed on deferred adjudication after being charged with one of those offenses, to be subject to the control measures of Section 81.083, Health and Safety Code, and to the court-ordered-management provisions of Subchapter G, Chapter 81, Health and Safety Code.

Art. 42.12 § 21(a) (separation of powers violation; alleged violation of community supervision justifies arrest, regardless of whether alleged violation is criminal or non-criminal conduct) (emphasis added).

(b) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge to be noted on the docket of the court. A defendant so arrested may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge. Such officer shall forthwith report such arrest and detention to such judge. If the defendant has not been released on bail, on motion by the defendant the judge shall cause the defendant to be brought before the judge for a hearing within 20 days of filing of said motion, and after a

hearing without a jury, may either continue, extend, modify, or revoke the community supervision. A judge may revoke the community supervision of a defendant who is imprisoned in a penal institution without a hearing if the defendant in writing before a court of record in the jurisdiction where imprisoned waives his right to a hearing and to counsel, affirms that he has nothing to say as to why sentence should not be pronounced against him, and requests the judge to revoke community supervision and to pronounce sentence. In a felony case, the state may amend the motion to revoke community supervision any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The judge may continue the hearing for good cause shown by either the defendant or the state.

Art. 42.12 § 21(b) (separation of powers violation; Due Process violation; order of judge replaces warrant, thus replaces conditions that accompany warrant, i.e., legislatively defined criminal offense and evidence of such) (arraignment within **20 days** after motion by defendant; *but cf.* Art. 15.17 (arraignment within **48 hours** after arrest, i.e., no motion needed); *but cf.* Art. 26.03 (**no arraignment for first two complete days** after service of Indictment)) (emphasis added).

Texas Rules of Appellate Procedure

RULE 25. PERFECTING APPEAL

25.2 Criminal Cases.

(a) Rights to Appeal.

(1) Of the State. ...

(2) Of the Defendant. ... The trial court shall enter a certification of the defendant's right of appeal in every case in which it enters a judgment of guilt or other appealable order. In a *plea bargain case* — that is, a case in which *a defendant's plea was guilty or nolo contendere* and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant — a defendant may appeal only:

(A) those matters that were raised by written motion filed and ruled on before trial, or

(B) after getting the trial court's permission to appeal.

TEX. R. APP. P. 25.2(a)(2) (emphasis added). *But cf.* [C-60] ("I, judge of the trial court, certify this criminal case: *is not a plea-bargain case*, and the defendant has the right of appeal[.]).

Key Statutory Language—Question 3

Texas Code of Criminal Procedure

ART. 42.12 § 13B(a)(1)(B)—"CHILD SAFETY ZONE."

(a) If a judge grants community supervision to a defendant described by Subsection (b) and the judge determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, *the judge shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant:*

(1) *not:*

(A) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or

(B) go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility[.]

Art. 42.12 § 13B(a)(1) (emphasis added).

ART. 42.12 § 13B(i)—*RICKELS*, AND THE 2003 “ZONE” EXCEPTIONS.

On 25 June 2003, the Court of Criminal Appeals hammered Rickels for being within 300’ of a school, *cf.* Art. 42.12 § 13B(a)(1)(B) (1,000’), simply by virtue of his residence. *Rickels*. The legislature responded *immediately* with Art. 42.12 § 13B(i), ² creating “zone” exceptions: ³

(i) Notwithstanding Subsection (a)(1)(B), a requirement that a defendant not go in, on, or within 1,000 feet of certain premises does not apply to a defendant while the defendant is in or going immediately to or from a:

(1) community supervision and corrections department office;

(2) premises at which the defendant is participating in a program or activity required as a condition of community supervision;

(3) residential facility in which the defendant is required to reside as a condition of community supervision, if the facility was in operation as a residence for defendants on community supervision on June 1, 2003; or

(4) private residence at which the defendant is required to reside as a condition of community supervision.

² “Sec. 13B(i) added by Acts 2003, 78th Leg., ch. 353, Sec. 3, *eff. Sept. 1, 2003*.”

³ Tello’s supervision agreement is dated 18 March 2004. [A-8].

Art. 42.12 § 13B(i) (***all emphasis added***).

Texas Penal Code

§ 2.02. EXCEPTION.

(a) An exception to an offense in this code is so labeled by the phrase: "It is an exception to the application of"

(b) The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception.

TEX. PENAL CODE ANN. § 2.02 (West 2003).

Citations to additional authority

Art. 42.12 § 9A(c) (related to § 13B(a)(2) and § 13B(c) regarding the meaning of *specify*; by what authority may a probation officer compel SOTP counselor selection?)

Art. 42.12 § 10(e) (negotiated character (of *modifications*) of "supervision" terms).

Art. 42.12 § 11(a)(14), (22), (e) (non-"exigent circumstance" blood samples are highly suspicious, and dubious in authority).

Art. 42.12 § 22 (these additional terms and conditions for supervision are 100% non-criminal, 100% judicial and 100% discretionary).

Art. 42.12 § 22(a)(4)(B) (preponderance standard based "affirmative finding").

Art. 42.12 § 22A (baseless extension of supervision).

TEX. OCC. CODE ANN. §§ 109.051 to 109.053 (West 2004)
(separation of powers violation; *Miranda* violation;
HIPAA violations; certain disclosures, see § 109.051(b),
are mandatory).

42 U.S.C.A. §§ 1320d-6 and 1320d-7 (West 2003)
("HIPAA") (exposes separation of powers violation by
Texas statutes; exposes *Miranda* violation by Texas
statutes; certain disclosures are prohibited; "probation
officer" nowhere identified as a medical services provider).

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 321(d), 5101, 5102, 5103 (2000).

42 U.S.C.A. § 1320b-9(k) (West 2003).

Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91
Stat. 1227, 1229 (codified as amended at 31 U.S.C.
§ 5118(d)(2)).

Coinage Act of 1965, Pub. L. No. 89-81, § 211(a), 79 Stat.
254, 257 (July 23).

H.R.J. Res. 192, 73d Cong. (1933) (enacted) (Sess. I, Ch.
48, June 5) (Public Res., No. 10) (48 Stat. 112, 113
(1933)) (formerly codified at 31 U.S.C. § 463) (codified
as amended at 31 U.S.C. § 5118(d)(2)).

Statement of the Case

Trial Court Jurisdiction

28 U.S.C.A. §§ 1331, 1333(1), 1367, (1441,) 1651 and 2241. The habeas is specifically not a § 2254 matter.

Indelibly branded for life

This is the permanently humiliating part. After originally pleading Not Guilty, Tello agreed to plead guilty to two counts of indecency with a child (exposure), and one count of possession of child pornography.⁴

"The" companion issue to *Blakely*

Blakely and *Booker* expose use of the preponderance standard in the *sentencing* phase. Here, we see use of the preponderance standard in the *adjudication* phase.

Procedure—Core of the removal issue

Revocation is civil.

See *Whitney*, 649 F.2d at 298 (federal—revocation is not a criminal proceeding); *Rodriguez*, 804 S.W.2d at 517, *Jackson*, 915 S.W.2d at 105-06 (state—preponderance standard); *Rinto*, 628 S.W.2d 159 (revocation is purely within the informed discretion of the judge). Revocation addresses only an alleged breach, not a criminal charge.

Ex parte capias issued for non-criminal conduct on no evidence—a completely preemptive federal question.

STATE arrested Tello on a capias, [A-22], issued ex parte, by a visiting judge, on an unsworn motion to revoke alleging legally impossible, non-criminal conduct. [A-20].

⁴ In the *state* court, Tello filed an amended motion to suppress the computer. Mr. Ed Mahon assisted with this effort. The court never ruled on the motion, denying it by completely ignoring it. The wife admitted during divorce proceeding depositions that she never had permission or authority to use Tello's computer, which was in his office, *cf. Leventhal*, and password protected. *Cf. Trulock*. She had asked a neighbor, a former Rockwall PD officer, who lived across the street with her husband, a local real estate agent, to "disengage" the computer and to look for divorce-related financial records. This neighbor went home and came back with a box for evidence. *Paige*.

Procedure—Core of the adjudication issue

STATE breached, then kept the benefit of the deal!

STATE alleged legally impossible charges and then arrested Tello without any evidence whatsoever. Thus, **STATE** breached the supervision agreement.

Nonetheless, on remand, the state court revoked supervision and then used the *bargained-for* guilty plea as evidence for purposes of adjudication. But, which plea actually moved forward as evidence—the unilateral, voluntary, “confessed” *trial* plea of Not Guilty, or the induced, *negotiated* plea of guilty? The answer, Not Guilty, is found in the trial court’s appeal certificate, which states that this “is not a plea-bargain case.” [C-60]. See TEX. R. APP. P. 25.2.

Where the *Bond* revocation appeal is included via Rule 11, this adjudication issue would have to be addressed. ⁵

Substantive Details—The Dallas County *Batson* violations pale in comparison

All Tello needed was a law-abiding probation officer.

Tello self-started with SOTP counseling.

Soon after the arrest, under the advice and guidance of defense counsel, Tello *self-started* in SOTP counseling. That was not quite a year before trial. ⁶

Forming the plea agreement.

In exchange for guilty pleas, STATE offered the five-year ⁷ deferred adjudication deal. To secure the wife’s consent, the DA asserted the wife’s demand that Tello terminate parental rights to their daughter and son. [E-1]. The DA generously allowed Tello an entire 15 minutes to decide the question. ⁸

⁵ See, *infra*, p.11, n.23.

⁶ Set about two weeks before elections. Case received local and internet publicity. See exhibits with Notice of Removal.

⁷ Tello’s defense counsel, Blessing, had first negotiated a two-year deal, which, in the heat of trial preparation, Tello declined.

⁸ Tello’s appellate counsel, White, stunned the state appellate court when he pointed out that his 20-minute period for argument was

NILES-JONES tortiously interfered.

Once the supervision agreement, ⁹ [A-8], was formed, CAROL NILES-JONES, the "I'm the czar here!" ¹⁰ certified probation officer (sex offenses), was assigned. She immediately yanked Tello out of his SOTP program and compelled him into MERCHANT's program. [C-30]. ¹¹

NILES-JONES intended to set Tello up—It backfired!

Per popular thinking, the second dismissal from group constitutes basis to revoke supervision. MERCHANT dismissed Tello from the very first group session. Tello needed to keep a daily journal, found several reasons to question MERCHANT's services and wanted to prevent the "he said, he said" problem. So, Tello wore a wire to future counseling sessions. [C-20]. As the compelled relationship deteriorated, Tello filed ethics complaints against MERCHANT. [C-21].

In blatant retaliation against Tello for filing those ethics complaints, MERCHANT made Tello the focus of the group session, compelling Tello to discuss the ethics

longer than Tello's decision time for termination of his parental rights.

⁹ "A court granting probation and its probationer have a contractual relationship." *Rickels*, 108 S.W.3d at 902 and n.7 (citing *McDonald*, 442 S.W.2d at 387). Supervision and probation are the same, here.

¹⁰ This is an adjective using quotes instead of hyphens. It's not a quote.

¹¹ The animosity arises from NILES-JONES' self-satisfied conclusion that Tello molested his son, which Tello has vehemently denied from the instant the mere thought first arose. Tello took, **and passed**, two, not one, but two, polygraph exams, a year apart, **on this very issue**. The latest exam came *not* at the request of an SOTP counselor, *see* [A-18] n.12, but by NILES-JONES directly, [C-44], who was literally and **illegally** abusing Tello *and* the SOTP program, by using a clinical tool for investigation purposes. NILES-JONES requested medical exam/diagnosis questions that no probation officer on the face of the planet has **any** business, **or authority**, asking. NILES-JONES and MERCHANT **refuse** to accept the facts. Nothing but Tello's confession to something he never did will satisfy either of them. [C-14-15; -36-37].

From the instant NILES-JONES was assigned to this case, Tello has been nothing but raw meat in the piranha pool. What Tello needed was a law-abiding probation officer who didn't see herself as Castro, Dr. Shrink and Sgt. Friday all rolled into one; hence, the removal.

complaints before the entire group, which grandstand play ended with MERCHANT's second dismissal of Tello from group (end of May, 2004). *Id.* Tello immediately filed state and federal criminal retaliation charges (with tape transcripts). See [C-23 to -25] (MERCHANT confessed).

STATE's original motion—a legally impossible charge.

STATE "secured" the second dismissal from group in May, but filed nothing until July 2004, [A-20]. Even then, STATE's original motion mentioned absolutely *nothing* about "unsuccessful dismissal" from group.

All it mentioned was an alleged "child safety zone" matter, also from May. Tello's business is custom-designed filters for commercial air conditioning systems. This particular customer is a day care, which ordered a summer-lasting (i.e., large amount) of supplies. Tello tried to contact NILES-JONES, who was conveniently out of town that week (May, 2004). Tello assisted with the delivery, which the customer wanted delivered inside. Tello was there "less than a minute," [C-4 to -5], and, obviously, another adult was always present.

On the face of STATE's motion, we find this:

- ***It is unsworn.***
- It failed to negate the exceptions, e.g., Tello's "work" requirement. Cf. TEX. PENAL CODE ANN. § 2.02. In fact, the motion doesn't even recognize the *existence* of the exceptions. Thus, STATE never alleged the threshold existence of the "zone," without which there simply can be no violation, as a matter of law.
- Thus, it fails to allege an "actual grievance," which raises the threshold issue of standing. See *Sunset Valley* (addressing standing and sovereign immunity); *Tex. Dept. of Parks & Wildlife v. Miranda* (the Mirandas failed to allege gross negligence facts to overcome the immunity defense).
- It requests arrest for alleged breach of contract, i.e., non-criminal conduct. Cf. Art. 42.12 §§ 5(b), 10(c), 12(c), 21(b).

The visiting judge ordered Tello arrested.

The "judge" granted the *capias*, [A-22],

- *ex parte*;
- without notice to Tello (or his attorney);
- without Tello's having an opportunity to respond; and
- ***without one shred of evidence***, even of the alleged breach, much less of negation of the "work" exception, much less of any criminal conduct. *Cf.* Art. 42.12 §§ 5(b), 10(c), 12(c), 21(b).

An epitome of retaliatory lawlessness, under color.

STATE, having never read Art. 42.12 § 13B(i), yet knowing full good and well that Tello was ***working*** (an "***ordered***" term of supervision), willfully filed an unsworn motion to revoke, alleging a legally impossible breach of the "zone." Since STATE never even mentioned negation of the *statutory exceptions*, STATE's lack of standing arises instantly. Still, the "judge," acting *ex parte* and ***without evidence***, ordered Tello arrested.

Nothing about this case improved from this point.

STATE breached the agreement!—There was no "child safety zone," as a matter of law!

The statutory exception to the "zone," Art. 42.12 § 13B(i), applies, because Tello was at all times *within* the "ordered" terms of supervision. STATE *proved* this during the revocation hearing, by its own witness. [C-4]. Thus, STATE both (A) failed to *negate* the *work*-exception, and (B) fully *proved up* the *work*-exception. Thus, *there was no "zone,"* as a matter of law, twice over.

Thus, critical here is that **STATE** blatantly breached implied and indispensable terms of the agreement. STATE not only (1) *charged a legally impossible* breach, but also (2) *arrested* Tello based upon such. (Then, really capping it off, (3) on remand, the state court *ruled* that *Tello breached the agreement.*)

Tello removed the *civil* revocation proceeding.

Because this *civil* revocation proceeding, supported by *ex parte*, no-evidence-needed, no-crime-needed *capias*,

raises a completely preemptive federal question, Tello removed it to federal court. The practical objective was simply to have a law-abiding probation officer assigned.

Habeas.

Tello then filed a third-party complaint for habeas. The initial, temporary custodian was the Sheriff, and rather than sever out the habeas action, the federal trial court abstained and denied habeas.

Fifth Circuit stopped here.

The Fifth Circuit focused on the threshold removal, i.e., STATE's original motion. That focus would have us stop about here. But to do so is to miss the environment that encouraged NILES-JONES. Also, Tello removed the *proceeding*, thus, where amendment applies nunc pro tunc, *all* amended motions. (Abstention-based remand is reviewable. See Points 1, 3 and 10.)

Remand and STATE's amended motion to revoke.

A SECOND LEGALLY IMPOSSIBLE "ZONE" CHARGE.

On remand, STATE amended its motion (Jan. 2005). [B-1].¹² The second "zone" charge is as legally impossible as the first, and for the very same reason: no "zone" due to the *work*-exception. [C-7 to -8].

TELLO'S PHYSICIAN-PATIENT PRIVILEGE.

STATE's third charge, "unsuccessful dismissal" from group,¹³ compels the privilege issue.

The sole source of evidence for such a charge is the probationer's SOTP counselor. Here, that's the same counselor NILES-JONES *forced* Tello to see, and who, on cross-examination, confessed that Tello's second dismissal from group was retaliatory. [C-23 to -25].

But there's an even deeper problem here, a *Crawford*

¹² The original Assistant DA was reportedly elected as DA in another county. Two new Assistants picked up right where the first left off.

¹³ Procedurally, this issue arose after remand, meaning Tello's first opportunity to address it in the federal court was on appeal. Even though an amendment operates nunc pro tunc, the appellate court denied Tello's motion to supplement.

problem. Texas bifurcates this evidentiary privilege—this one applies only in *civil* proceedings. TEX. R. CIV. EVID. 509. Thus, it matters greatly that STATE called MERCHANT to testify even though Tello never waived his Physician-Patient privilege!

STATE benefited from breaching the deal!

The benefit of the deal to STATE is the guilty plea.¹⁴ On hearing, the 382nd Judicial District Court, Rockwall County, Texas (Brett Hall),¹⁵ revoked Tello's supervision. STATE breached (e.g., *no-evidence-needed* arrest for legally impossible, non-criminal breach, MERCHANT's retaliation, compelled waiver of privilege, etc.), but was allowed to keep the benefit of the deal, i.e., the induced plea. Following the determination that Tello somehow breached (by remaining 100% within the *standard*, "*ORDERED*" conditions; by *not* waiving his privilege, etc.), and based upon the negotiated plea, the state court *adjudicated* Tello guilty, on a preponderance standard, on three felony counts, without a jury, and sentenced Tello to seven years in TDC. [C-53, -56].

Preponderance-standard-based adjudication.

The five-year deferred adjudication settlement agreement ended the jury trial. Then STATE materially and totally breached that agreement. Thus, there is (1) no guilty plea, (2) no jury fact-finding, (3) no evidence admitted per judicial notice and (4) no otherwise incompetent "evidence" agreed to. In short, Tello was *adjudicated* guilty on three felonies by a fact-finder applying the *preponderance standard to no evidence!*

The *Blakely*-violating sentencing speaks for itself.

The Right to Appeal certificate.

This "*is not* a plea-bargain case." [C-60] (emphasis added). Thus, for *adjudication*, the plea is guilty, yet on *appeal*, Not Guilty!?! More over, the *reason* there is (A) material and total breach of the supervision agreement,

¹⁴ *And*, as *parens patriae*, "voluntary" termination of parental rights!

¹⁵ Son of Ralph Hall, long-term congressman from Texas.

thus, no plea bargain, is because (B) **STATE** breached it!
Mickens notice and post-trial motions.

Tello bent over backwards, double, 14 ways from Sunday, to give the state court every humanly conceivable opportunity to get its misguided bulldozer off the road. Nothing worked. The state court did hear Tello's *Mickens* notice and did grant him permission to proceed *pro se*. But, e.g., Tello's Motion in Arrest of Judgment, which pointed out the statutory problems *immediately* after entry of "judgment," was overruled by lapse of the 75-day period. See TEX. R. APP. P. 22.4(b).

The direct appeal.

THE RECORD PREPARATION FEE.

For preparation of the Record on appeal (three cases), the clerk sent a bill for 988.40 "dollars." The clerk's office is not a *private* office, but rather is a *public* office. Thus, the clerk's office *defies* federal monetary policy, 31 U.S.C. § 5103, not only by rejecting "federal reserve notes," but also by rejecting other forms of promises in discharge. [C-62, -63]. Tello characterizes the "judgment" as illegal and retaliatory, thus, the fee as extortionate. Therefore, whatever fee Tello is lawfully expected to discharge, he has more than discharged it.

POSTPONEMENT AND THE *COLORADO RIVER* DOCTRINE.

The state appellate court denied promptly Tello's request for postponement of submission, to await the Fifth Circuit's ruling. Clearly, where removal is proper, the state *trial* court never had authority to *adjudicate* anything; hence, no judgment to appeal and no state *appellate* court jurisdiction in the matter.

Between the Chief Justice of the appellate court, [C-68], and the reflective, deliberative response time from the state supreme court's Clerk, [C-70], Tello was afforded, *de facto*, his requested relief under an *appellate* application/extension of the *Colorado River* doctrine.

THE RECORD, THE FEE AND MANDAMUS.

To get the Record delivered to the "direct appeal"

panel, Tello sought mandamus. [C-64, -67]. Originally, the "direct appeal" panel pitched a flyin', screamin'-mimi fit. Threatening sanctions, [C-64], contempt, [C-65], and dismissal, [C-72], the "direct appeal" panel *openly defied* the monetary policy of this state, not only by compelling Tello to discharge the fee *twice*, but also by purporting to have authority to compel the form of the promise in discharge in the first place. [C-65]. In order to have his brief on direct appeal filed before the threatened dismissal deadline, Tello submitted it more than two weeks early. *See also* [C-77 to -78]. Since STATE recently submitted a late brief, [C-74], it appears that the "direct appeal" panel have settled down on the point. The "Bond appeal" panel have the full Record, anyway.

The Bond—stripping statutory protection?

Upon adjudication and sentencing, STATE jailed Tello. To get out, Tello was compelled to obtain Bond. [D-1]. The custom-drafted conditions require Tello to give the Sheriff both *residence* and *work* addresses, [D-4, -20], but **did not overtly** include either *residence* or *work* as conditions. Thus, it's perfectly clear that the "judge" and DA intended to overrule the Legislature (§ 13B(i)) and to reinstate *Rickels*, i.e., they intended to strip Tello of his § 13B(i) statutory protection. [D-16 to -17].

STATE's motion to revoke Bond.

STATE wasted no time whatsoever in trying to jail Tello, again. STATE sought Bond revocation, [D-6, -7], **six days** after Tello was released on Bond, [D-1], charging him with two more alleged "zone" violations.

From the instant he was released, Tello was stalked by Christian Farmer, a child molestation victim from his youth camp days at Camp Paluxy, a landmark in Erath County (near Stephenville) by the director, Theodore Wood, *See Affidavit* [C-75]. Christian is the grown, married son of Jacqueline Farmer. Jacqueline is Tello's number one assistant with the filter business. *Id.* Christian's brilliant detective work (stalking), coupled

with Bond conditions that unconscionably intend to defy legislative policy, produced the two new charges.

RESIDENCE-BASED "ZONE" CHARGE.

Since another condition of Bond was that Tello not go back to his own house, ¹⁶ Tello, having just been released from more than NINE MONTHS of illegal incarceration, had no place to stay. Jacqueline Farmer offered him a room until he could settle and find another place. Tello gave notice of the address in the Bond hearing.

Christian deftly determined that his Mom's home is within 1,000' of the nearby church, thus its day school.

WORK-BASED "ZONE" CHARGE.

Christian stalked Tello all day one day, following Tello everywhere, then talking directly with Tello's customers. One particular customer, as it turns out, is within 1,000' of a day care that is *behind* their building, thus never even known by Tello (as just one of *many*) to exist.

The present "official" reading of the Bond *judicially* confesses the illegality of the original arrest!

The *standard* terms of Tello's *supervision* "**ORDER**" required both *work* and *residence*. But the DA's and "judge's" custom-designed **Bond** very deliberately, overtly required neither. [D-16]. Also, on first pass, the "Bond appeal" panel *supports* that reading, blaming Tello for not negotiating overt *residence* and *work* terms into the Bond. [D-54]. ¹⁷ Quite fittingly, then, these scienter-based absences from the **Bond *judicially* confess** the illegality of the original arrest (July, 2004); hence, also, the facial voidness of the "judgment" that gave rise to the *need* for

¹⁶ First, Tello was ordered to maintain the house *and* to sell it. [E-17]. Then, Tello was ordered not to go anywhere near his house. [D-4]. Real estate agents don't sell houses without making a walkthrough, always done *with* the client. Since Tello couldn't do a walkthrough, sale was rendered impossible! Early in July, 2005, the mortgage company foreclosed and sold the house. Notice is a *huge* question. See [E-18].

¹⁷ What this panel is also saying, whether intending to or not, is that they don't even have subject matter jurisdiction, i.e., *that* this civil contract dispute, enforceable by arrest, was properly removed.

Bond in the first place. With that point *twice* established, since *work and residence addresses* are required, [D-4], how is the *related conduct* not also required?!

Tello removed the Bond revocation proceeding, and Hall defied the automatic stay.

When Tello removed the *divorce* proceeding, ¹⁸ Hall stopped. When Tello removed the *supervision* revocation proceeding, ¹⁹ Hall stopped. But, when Tello removed the *Bond* revocation proceeding, ²⁰ as contract-oriented, i.e., *civil*, a dispute as exists on the face of the planet, Hall kept his bulldozer running full tilt. . .

Critical here is that *during the automatic stay*, Hall set not just one, but two, hearings. Since the Bond revocation matter was removed, there was no action *pending* in the state court, thus *nothing* that required Tello's attendance. Hall revoked Bond, anyway, when Tello did not appear for the *second* hearing Hall had set in contempt of the automatic stay. ²¹ Tello is back in TDC.

The federal trial court remanded, again asserting *Younger*. Third party habeas was also denied. ²² Tello has appealed to the Fifth Circuit. ²³

Hall's extortionate Judgments Nisi.

Not yet being done with his caged hunt, Hall then also issued *extortionate* Judgments Nisi to collect on the Bonds that not only are *still* not breached but also never lawfully existed in the first place! [D-41].

¹⁸ No. 3:04-CV-1354-K (N.D. Tex.) (Dal. Div.). See "tax" case, No. 05-90.

¹⁹ No. 3:04-CV-1718-N (N.D. Tex.) (Dal. Div.). This case.

²⁰ No. 3:05-CV-1049-N (N.D. Tex.) (Dal. Div.). The Bond case.

²¹ Tello was in the Clerk's Office, N.D. Tex., awaiting word that the hearing had, in fact, been called, so as to file his next motion for contempt. Remand came without rulings on those contempt motions.

²² In this post-S-11 phase, it's actually refreshing to see maintenance of the federal limitations over Sheriffs. Tello's transfer to TDC didn't happen until after remand, both times.

²³ This next appeal, No. 05-10914, is likely to be delayed due to Katrina. Should STATE also find this Court's Rule 11 applicable, Tello has no objection, and he reserves his Rule 12.5 position.

Argument

Remedies Requested

Reverse the Dismissal.

The federal trial court *has* jurisdiction, via removal and habeas. The dismissal on appeal is properly reversed.

Confirm Removal and Dismiss All Charges.

Removal was proper. Revocation is a *civil* matter, not *criminal*. Breach with no-evidence, ex parte capias raises a completely preemptive federal question of Due Process.

STATE, not Tello, breached, and egregiously so! All charges against Tello are properly ordered dismissed. Otherwise, remand for hearing with instructions to vacate all post-removal state court "orders," e.g., revocation.

Grant Habeas.

Since the detention was illegal *ab initio*, habeas is proper, and Tello should be released *immediately*.

Summary

Removal.

In criminal proceedings, Due Process *compels* application of the "beyond a reasonable doubt" evidentiary standard. *Apprendi*; *Blakely*. Restated in basic logic elements, if "criminal," then "beyond a reasonable doubt."

For removal analysis, Tello applies the contrapositive: if not "beyond a reasonable doubt," then not "criminal." Revocation of supervision is a *breach* claim evaluated on a *preponderance* standard, *Rodriguez*, *Jackson*, *Rinto*, thus "not 'beyond a reasonable doubt,'" thus "not 'criminal,'" thus *civil* for purposes of removal analysis.

A *civil* proceeding enforced by ex parte, no-evidence-needed, no-crime-needed capias, qualifies for removal.

Habeas.

Since this started as a removal proceeding, the third-party practice operates more on policy than specific rules. There is one form of action. FED. R. CIV. P. 2. Resolution of all matters arising from the same transaction or occurrence is encouraged. FED. R. CIV. P. 13, 14. Stated specifically in FED. R. CIV. P. 14(a) is this: "Any party

may move to strike the third-party claim, *or for its severance or separate trial.*" (emphasis added). Surely *sua sponte* authority to sever also exists, *especially* where *everything* is handled, as a practical matter, *ex parte*.

The Sheriff's custody is temporary, and habeas jurisdiction analysis is separate and distinct from removal jurisdiction analysis. Thus, even if remand were ever proper, the court's duty to sever arose, because federal habeas jurisdiction exists. Switching out the custodian is as difficult as amending or supplementing the pleadings.

Discussion

Removal, Jurisdiction

1. What is a "criminal proceeding?"

This issue is raised below by the very act of removal, itself. *See also* Points 2, 3 and 10.

The Fifth Circuit focused on the threshold removal of the revocation matter. Taking their lead, let's start there.

Key Due Process elements of a "criminal proceeding."

- Presumption of innocence—Art. 38.03; TEX. PENAL CODE § 2.01.
- Presumption rebutted only by *evidence, submitted under oath*—Arts. 1.06, 1.15, 7.01, 11.07 § 3, 11.071 § 9, 11.072 § 6, 15.03, 15.04, 15.26, 20.16, 21.22, 28.07, 45.014, 45.018, 45.019, 49.19 and 51.13 §§ 3, 13, 14.
- Capias issued (*only*) for commission of an *offense*—Arts. 23.01 and 23.02.
- Indictment for felony offense—Arts. 1.05 and 21.01-21.31; *but cf. Hurtado*; the O.J. Simpson case (California); the Kobe Bryant case (Colorado); the Col. "Bo" Gritz case (Connecticut). Per Art. 1.141, represented defendants may waive indictment.

- Charges alleging violations of *legislatively* defined offenses—*Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48; *Evans*, 333 U.S. at 486 and n.4; *Classic*, 313 U.S. at 331-32 (Douglas, J., dissenting).
- Arrest based upon probable cause (of an *offense*)—Arts. 1.06, 2.122(c), 11.45, 11.46, 14.03, 16.17, 17.033, 17.291, 18.03, 45.014 and 49.19(a).
- Arraignment—Arts. 15.17 and 26.01.
- Plea choices include not guilty, guilty or nolo contendere—Art. 27.02.
- Appointed representation (for those who qualify)—Arts. 1.051, 15.17 and 20.7; *Gideon*.
- Compulsory attendance of defense witnesses—Arts. 1.05, 16.10 and 16.11.
- Fair trial—Arts. 1.05, 2.03 and 31.01-31.03.
- Jury in felony cases—Arts. 1.12 (1.13—waiver) and 1.15 (unless waived in writing).
- Factual focus—is each element of the *offense* proved? Art. 38.03; TEX. PENAL CODE § 2.01.
- Confrontation, Cross-examination—Arts. 1.06, 1.15 (unless waived in writing); 1.25.
- **Evidentiary standard**—“**beyond a reasonable doubt**”—Art. 38.03; Tex. Penal Code § 2.01.

Elements of the revocation proceeding.

- Presumption of enforceable supervision settlement agreement (approved by the trial court)—[A-8].
- Hearing triggered by (unsworn) motion alleging breach of the agreement—[A-20], [B-1].
- Capias issued for breach, thus for non-criminal conduct—Arts. 42.12 §§ 5(b), 10(c), 12(c), 21(b).
- No Indictment or Information issued or required—Art. 42.12, generally.
- Charges may allege criminal or non-criminal conduct, as defined by or found in the court-approved settlement agreement—*Cf.* Art. 42.12 §§ 5(b), 10(c), 12(c), 21(b).

- Arrest based upon the mere existence of a motion to revoke. [A-22]. No criminal conduct is necessary. No evidence is necessary. No standing (subject matter jurisdiction) is necessary. A legally impossible charge (breach) is sufficient.
- Plea choices include true or not true—[C-57].
- Appointed representation (for those who qualify)—Art. 42.12 § 21(d).
- Compulsory attendance of defense witnesses—presumed.
- Fair trial—presumed.
- No jury option—Art. 42.12 §§ 5(b) and 21(b).
- Factual focus—was a term of the “community supervision” settlement agreement breached?—Art. 42.12 § 21.
- Confrontation, Cross-examination—presumed.
- **Evidentiary standard—preponderance—***Rodriguez, Jackson, Rinto.*

Focus—The Evidentiary Standard.

The Due Process analysis in *Booker* (federal), *Blakely* (state), and the *Apprendi* line, generally, focuses on the evidentiary standard. That same focus is more than adequate to resolve the removal issue raised here. Does the *preponderance standard* not proclaim to the world the type and nature of the proceeding removed? And where the removed *civil* proceeding raises completely preemptive federal questions, e.g., (illegal) arrest for *breach*, based upon no-evidence-needed capias of non-criminal conduct that is legally impossible to commit in the first place, how can federal removal jurisdiction *possibly* be denied?

Post-judgment enforcement of a settlement agreement is now a criminal proceeding?

The federal trial court saw the revocation matter as a, or as part of a, state criminal proceeding and abstained, citing *Younger*. Tello nowhere even remotely suggested injunction to stop the state revocation proceeding. Tello asserted his option regarding the proper forum and

authority to try the breach issues STATE raised.

If revocation were but a(nother) disguised non-*in-rem* matter, then removal *would* stretch the authority issue, that is, *if* the revocation matter were restricted solely to the issue of breach. But, it's *not* restricted solely to breach. Revocation *also* involves a liberty issue. STATE **arrested** Tello, on no evidence, of a legally impossible, non-criminal breach. That's not a remedial, *civil* contempt theory, but a *criminal* contempt theory gone completely berserk, defying Due Process on that aspect, alone. The very obvious intent is to punish, as threatened throughout Art. 42.12. But, that's just one of the jurisdictional doctrines involved. Equally manifest is that by **arresting** Tello, STATE did everything necessary to convert the non-*in-rem* settlement matter fully into an-*in-rem* proceeding.

The fundamental problem seems to arise from not reflecting upon the actual legal consequences of settling out criminal proceedings. Once STATE settles out the criminal charges, the matter becomes, from that instant forward, a civil matter.²⁴ While civil and criminal contempt exist, generally, neither contempt theory applies here. The fact that state legislative policy defies Due Process, by adopting the communist model, i.e., allowing, nay, *encouraging*, arrest for mere breach, does not convert the settlement matter into a criminal matter.²⁵

²⁴ The irony is fully realized. The direct analogy is to the unequal protection theory discussed in *Roe v. Wade*. How ironic is it that Roe, a *principal*, asserted statutory voidness due to the unequal prosecution practice that *benefited* the principals, leaving them untouched, i.e., unindicted, unarrested? While Roe "stops" there, Tello asserts practical aspects that look well beyond the initial irony (and benefit).

²⁵ On the flip side, where supervision is breached by criminal conduct, and where that crime is charged solely as a *breach* of the settlement agreement, not as a new crime, the systemic **encouragement** toward recidivism is also exposed. The new crime is but a mere breach, and not prosecuted. Thus, the Wendy's ® "substitution-combo crime deal" gets punished at the rate of whatever is the original crime charged.

Conclusion.

No revocation proceeding qualifies as a criminal proceeding. The fact that someone is supposedly subject to arrest is not what characterizes the matter. It's the *reason* for that arrest that characterizes the matter. And, the *reason* manifestly self-identifies itself through the evidentiary standard to be applied.

The *reason* for arrest in a revocation matter is the alleged *breach* of the supervision agreement. Without a new Indictment, Information or arrest warrant, even a new criminal charge does not justify arrest, for it is not viewed as a *crime*, but solely as a *breach*. And, whether the (non-)conduct at issue is a breach is determined by the preponderance standard, without a jury.

A criminal matter ceases to be a criminal matter the instant the settlement agreement is entered into. And, unless the matter is *in rem*, nothing about a (mere) breach of contract, or even a total breach, justifies a *capias*. Further, no *ex parte* relief is even possible, much less lawful, without evidence.

Where STATE fails to establish its standing, fails to negate the statutory exceptions, and launches off into a retaliatory scheme by alleging legally impossible charges, the issuance of a *capias* is a criminal act, under color.

Revocation deals solely with breach of contract. A breach of contract matter is a civil matter. A civil matter enforced by an *ex parte, no-evidence-needed capias* is not even an *in rem* matter. Such *capias* is so illegal on its face as to raise a completely preemptive federal question—denial of liberty without Due Process.

In sum, Tello's removal of this revocation proceeding was more than proper.

Abstention violated federal policy. Remand violated federal policy, and all state court "orders" entered subsequent to remand (none was entered during pendency of the removal) are void for lack of jurisdiction, starting with revocation.

Statutory Challenge

2. Does an unsworn motion, alleging non-criminal conduct, ever justify ex parte issuance of a capias?

See Point 10.

Revocation exposes massive separation of powers and Due Process problems.

Judges don't define crimes, and no legislative body has authority to delegate the crime-defining power. *Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48 (rule of lenity—(1) common language (2) legislatively enacted). *Bass* distinguishes court-defined crimes from legislatively defined crimes. See also *Evans*, 333 U.S. 483, 486 and n.4 (1948) ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.").

The catastrophic problem is systemic, by design.

The key language of focus is included, *supra*.

Between (A) the threshold policy, Art. 42.12 § 1, by which the legislature delegates to the courts full authority over the content of the terms of supervision, combined with Art. 42.12 § 11, which lists examples of the non-criminal conduct to be included as terms of supervision, and (B) the several "arrest for breach" sections, e.g., Art. 42.12 §§ 5(b), 10(c), 12(c), 21(a) and 21(b), the conclusion is impossible to miss. The Texas Legislature purports to have the authority to delegate crime-defining authority to the judges, allowing judicial fiat-defined-crimes to be custom-crafted on a case-by-case basis. Further, any alleged breach is, by definition, aailable offense, confirmation of which is determined by the preponderance standard without a jury. *Rodriguez, Jackson, Rinto*.

The no-evidence-needed capias.

Not only is mere breach elevated to a criminal offense, but also such claim may be enforced with a capias, granted ex parte, and needs no evidence, even of breach.

No-guilty-plea-needed adjudication.

As addressed by TEX. R. APP. P. 25.2 and the "right to appeal" certificate, the plea used for *appeal* is the original Not Guilty plea.²⁶ So, by what contortion of law may the negotiated guilty plea induced by STATE for purposes of the supervision agreement be used for *adjudication*?

Conclusion—Entire scheme violates separation of powers and Due Process.

The entire plan is made from fabric indelibly stained with mind-numbing separation of powers and Due Process atrocities. Pre-trial settlement agreements are fine. But, such agreements are enforced with remedies sounding in damages or in injunctive/mandamus relief. Where remedial matters exist, civil contempt is fully applicable, and certainly criminal contempt may be charged where all elements are satisfied. But, to design an entire system on this gagging stench, that mere breach is a criminal/jailable offense, is to usher in the communist model. Political affiliation is and always will be purely unilateral and discretionary, but this state will not yield on matters of separation of power or Due Process. In sum, the communist model is still illegal in this state. Therefore, Art. 42.12 §§ 1, 5(b), 10(c), 11, 12(c), 21(a) and 21(b) are void on their face and unenforceable, for violation of separation of powers and for violation of Due Process.

Epilog.

The procedural solution for pre-trial settlements is obvious. The agreement tolls any "speedy trial act" objection, and where defendant's breach is *total*, the next step is trial. But, revocation *must* be reviewable, for the exact reason well demonstrated here. STATE *cannot* benefit from its own breach. Where STATE breaches, the charges must be dismissed, not tried.

²⁶ The *only* other option is that Tello's plea of Not True, to the charge of breach for purposes of *revocation*, *is* the plea for the *adjudication*. Technically, Not True, like Not Guilty, does fail the TEX. R. APP. P. 25.2(a)(2) test. But this is nuts on its face! *But see* [C-37] a.8.

Due Process, Removal, State Court Subject Matter Jurisdiction and Comity

[Raised for first time here]

3. Did STATE's (amended) motion to revoke satisfy its burden on standing?

Development of the Question.

The Points raised below from which this one developed focus on STATE's breach, thus, on the plea and the fact that STATE can't breach the deal *and* keep the benefit. See Points 8, 6 (supp.), 9 and 10. What this Question adds is an even more foundational view of STATE's breach.

Texas law: STATE can't breach *and* benefit.

It's an ancient firmament in the law—a party who breaches the agreement cannot also look to the agreement or claim any benefit from it. See *Dobbins*, 785 S.W.2d at 378. Cf *Mead*, 615 S.W.2d at 689. See *Information Communications Corp.*, 181 F.3d at 632-33 & n.1. "One may not terminate a contract and his obligations under it and then claim any benefits which may arise from it." *Dennison Mattress Factory*, 308 F.2d at 413. A party cannot benefit more from the breach of the agreement than from its performance. RESTATEMENT (Second) OF CONTRACTS § 347 (1981) (cmt. e). Accord *Pappan Enterprises, Inc.*, 143 F.3d at 806; *Ranger Nationwide, Inc.*, 658 F. Supp. 103.

STATE's breach: making note of what's missing.

STATE breached by filing the (amended) motion, which charges legally impossible breach, then escalated by making the illegal arrest. The most obvious thing missing, even if arrest for non-breach *were* legal, is the evidence necessary to justify *any* ex parte ruling.

Regarding both the original and amended motions, also missing is STATE's negation of the exceptions to the "zone." Art. 42.12 § 13B(i). And, regarding the amended motion, also missing is any waiver by Tello of his

Physician-Patient privilege. By these absences, STATE alleges no "actual grievance."

Standing: Federal standard—"injury in fact."

Phillips Petroleum Co.; Lujan, 504 U.S. at 561. The injury is analyzed separately from the merits.

Standing: Texas standard—"actual grievance."

Tex. Dept. of Parks & Wildlife v. Miranda.²⁷ The grievance is analyzed in the context of the merits, and via summary judgment standard.

Removal and STATE's lack of standing—Part 1.

Removal here basically asks two questions: (1) is the matter civil? and (2) is there a completely preemptive federal question raised?

Since revocation is civil, the focus turns to the federal question analysis. Where STATE even requests, much less makes, an *arrest* for a legally impossible *breach*, via an *ex parte* proceeding, *without evidence* of any alleged breach much less of any crime, and *without standing*, thus without ever triggering the state court's subject matter jurisdiction, it follows that it's difficult to find a more flagrant, lawless, defiant breach of Due Process.

Procedurally, the Notice of Removal is to contain all bases for removal. See 28 U.S.C.A. § 1446(a). And, it may or may not matter that the objections specific to the illegal arrest/detention are articulated in the third-party habeas petition, not the Notice of Removal. Either way, the objection to lack of standing can't be waived. Thus, where the focus is the existence of a completely preemptive federal question at the time of removal, and where STATE's (amended) motion never established standing, the necessary federal question exists. STATE's lack of standing, coupled with any request for relief, in any form, raises a Due Process issue. Further, out of the academic and theoretical and into the practical, the state court

²⁷ "Injury in fact" is an "occurrence trigger" for insurance. This may explain the virtual non-existence of the term "injury in fact" in Texas jurisprudence regarding standing.

granted relief, i.e., the *capias*, *ex parte*, based upon that no-legally-possible-breach-needed, no-crime-needed, no-evidence-needed, no-standing-needed motion.

Removal and STATE's lack of standing—Part 2.

As may be self-evident, Parts 2 and 3 look forward.

May the federal court abstain where federal jurisdiction exists and state jurisdiction does not?

At the threshold, does abstention, by its mere assertion, not confess the existence of federal jurisdiction? Comity is not a bar, a prohibition; it's a choice. Thus, the focus is the lack of state court jurisdiction.

If it were humanly possible to remove the revocation proceeding the *instant* the motion was filed, thus in that interim between filing and the *ex parte* hearing, the federal question would still exist. It's inconceivable that mere breach, even material and total, justifies arrest.

But, it isn't humanly possible, and the state court **granted** relief to STATE, *instantly* and *ex parte*, via that *capias*. So, the matter, as removed, includes that ruling. The state court acted, authorizing Tello's arrest, not only without evidence, but also without jurisdiction. Thus, the state court already demonstrated its complete lack of interest in Due Process or any limitations on its authority.

The analogy is to the duty to speak. Where the federal court *has* jurisdiction, but abstains, in the face of a state court's acting without jurisdiction, not merely without law or by abuse of discretion, but without jurisdiction, the federal court has breached its affirmative duty to take the case, it's duty to speak, as it were.

Removal and STATE's lack of standing—Part 3.

May a federal court *with* jurisdiction remand to a state court that *lacks* jurisdiction? How is comity served?

The fundamental point of comity is to allow the state process to take its own course and by its own rules. But, where, by its own rules, the state court has no authority over the matter, where's the interference?

Removal, jurisdiction and judicial burden—a thought on procedure.

On the habeas issue, § 2254 came up. Whether § 2254 applies or not, isn't the focus. Tello overtly stated that this is not a § 2254 matter, but the federal court thought § 2254 applied. Looking at the procedure, Tello noted on appeal that where the habeas applicant overtly asserts the non-application of § 2254, thus the obvious absence of any such facts pled, and where the federal court feels that § 2254 does apply, who's right and wrong isn't quite so important as the opportunity to discuss the issue. So, the federal court should issue, instead of remand, a show cause order. Rather than being in such an all-fired hurry to slam the door shut, the better approach is to study the issue. No one is looking for more work to do, but how much additional work has been compelled by this one?

Applying that very same procedural perspective to removal, generally, what Tello is suggesting is additional subject matter jurisdiction analysis by the federal court, already overburdened. Tello is suggesting that the federal court ask the next question: does the state court from which this came have subject matter jurisdiction? And, rather than burdening the federal court with the full brunt of that analysis, what Tello is also suggesting is that rather than being in such an all-fired hurry to slam the door shut, the federal court should issue a show cause order. Even that doesn't guarantee that all jurisdictional issues would be raised at that time. However, as such procedure is utilized, there'll be more focus on the point.

At the end of the day, federal jurisdiction over state revocation proceedings via removal is the ultimate focus. Revocation is a *civil* proceeding, sounding in breach of contract, but enforced by arrest. This epitomizes removal.

Conclusion.

STATE never even *alleged* an "actual grievance." In its original motion, STATE never negated the statutory exceptions to the "zone," meaning there was no "zone,"

rendering a "zone" violation legally impossible. Yet, by its original motion, STATE got Tello arrested and jailed. On remand, to justify that threshold arrest and detention further, STATE alleged a second "zone" violation, but, again, never negated the exceptions. STATE also alleged the "unsuccessful dismissal" from group charge, which is, on its face, retaliatory. But, even if Tello's "dismissal" were *completely* his fault, it's still legally impossible to prove. Tello never waived his Physician-Patient privilege. In sum, even if arrest for mere breach were conscionable, **STATE** totally breached the agreement by even *requesting* Tello's arrest where Tello did not breach.

To exacerbate its breach, STATE failed to establish its standing, thus jurisdiction. In addition to all other consequences, key here is the absolute confirmation of the existence of at least one completely preemptive federal question. Arrest for breach is hideous enough, but then also *without evidence and without jurisdiction!?* This case is a textbook study of removal and why it exists.

Habeas Jurisdiction (Sheriff as temporary custodian)

4. Where federal habeas jurisdiction exists, does *Younger* apply? (See Question 3.)

See Points 3, 4, 5 and 9.

Where § 2254 does not apply, may a federal court *ever* turn its back on a blatantly illegal arrest and detention? How much more blatant does the illegality need to be?—arrest for legally impossible breach, issued *ex parte*, ***without evidence!***

Further, since when is habeas relief even remotely a request that the state court proceeding be enjoined or otherwise stopped? *See Younger*.

5. Is the habeas matter severable from the removal matter?

See Points 3, 4 and 5.

As phrased, this might be considered new in this proceeding, or it might not be. Tello initiated two closely related but distinct proceedings: removal and habeas. While it was one opinion, the federal trial court addressed removal and habeas separately. But the appellate court, having determined that *removal* jurisdiction didn't exist, denied *habeas*, without independent jurisdictional study.

Removal analysis, alone, would resolve this matter in its entirety, given that all charges are properly dismissed due to STATE's breach. This would render habeas analysis moot. However, independent habeas jurisdiction exists in this matter, and Tello has preserved the point.

This is specifically not a § 2254 matter, because nothing about Tello's threshold arrest arises from a state court *judgment*. And, for STATE to allege a legally impossible breach as the basis for an arrest is unconscionable. So, federal habeas jurisdiction most definitely exists.

This matter may be unique in that the habeas proceeding starts by way of third-party claim, where the original case exists by way of removal. And, the aspect of the matter raised here examines into the appropriate procedure where the federal trial court, rightly or wrongly, finds no removal jurisdiction. Given that both the federal trial and appellate proceedings were 100% *ex parte*, does federal policy impose on the trial or appellate court the duty to sever out the habeas claim?

Since this started as a removal proceeding, the third-party practice operates more on policy than specific rules. There is one form of action. FED. R. CIV. P. 2. Resolution of all matters arising from the same transaction or occurrence is encouraged. FED. R. CIV. P. 13, 14. Stated specifically in FED. R. CIV. P. 14(a) is this: "Any party

may move to strike the third-party claim, *or for its severance or separate trial.*" (emphasis added). Surely *sua sponte* authority to sever also exists, *especially* where *everything* is handled, as a practical matter, *ex parte*.

The Sheriff's custody is temporary, and habeas jurisdiction analysis is separate and distinct from removal jurisdiction analysis. Switching out the custodian is as difficult as amending or supplementing the pleadings. Thus, even if remand were ever proper, the court's duty to sever arose, because federal habeas jurisdiction exists.

Conclusion

The following are important questions of federal law that have not been, but should be, decided by this Court:

- Is the Texas revocation of supervision proceeding removable, i.e., is it a civil proceeding that raises a completely preemptive federal question?
- Where habeas is asserted by third-party claim, is it properly severed where the federal court remands?
- May capias issue without evidence, of anything, much less without evidence of a criminal offense?
- May the federal court abstain where federal jurisdiction exists and state jurisdiction does not?
- May a federal court *with* jurisdiction remand to a state court that *lacks* jurisdiction? How is comity served?
- Does the Texas "community supervision" program violate separation of powers?
- Does the Texas "community supervision" program violate Due Process?
- Does the Texas Occupation Code violate HIPAA?
- Is STATE's breach total when it alleges a legally impossible breach by the probationer?
- Is STATE's breach total when it arrests the probationer without basis?

- Where **STATE** totally breaches its supervision — duty, are the charges properly dismissed?

The Fifth Circuit dismissed the appeal. What they're saying, then, is this:

- The preponderance standard applies for criminal proceedings.
- Disputes arising from pre-trial settlement agreements are criminal proceedings.
- Contract matters may be enforced by *capias*.
- *Capias* for breach may issue without evidence.
- *Capias* for breach may issue without notice.
- *Capias* for breach may issue without opportunity to be heard.
- *Capias* for breach may issue even for a legally impossible breach (thus, that **STATE** need not even allege any "actual grievance," thus that the court need not even have jurisdiction).
- That **STATE** may breach the agreement *and* keep the benefit of the deal, or that **STATE**, by alleging that Tello breached, by way of a legally impossible "zone" violation, and by arresting Tello without any evidence, whatsoever, much less evidence of any criminal conduct, did not breach the agreement at all.
- And, ultimately, that revocation of supervision, based on a legally impossible charge, evaluated by the preponderance standard and without a jury, and enforced by *ex parte*, no-evidence-needed, no-crime-needed *capias*, is not a civil proceeding that raises a completely preemptive federal question.

The Fifth Circuit also denied Tello's motion to supplement. What they're also saying, then, is this:

- Amendments to motions are not *nunc pro tunc*.
- Tello removed a motion, not a proceeding.
- Where HIPAA says, "Don't disclose," but the Texas

Occupation Code says, "Must Disclose!" there's still no preemption problem with the Texas statute.

- Probation officers may practice medicine without a license, and that such is consistent with HIPAA.
- Probation officers may animate the dual and conflicting roles of medical services provider and law enforcement officer simultaneously, even though HIPAA nowhere includes probation officer as a medical services provider.
- The Texas statutory plan built upon legislative delegation of crime-defining authority (to the courts) creates no separation of powers problem.
- The Texas statutory plan built upon enforcing judicial-fiat-defined criminal conduct, custom-crafted and applied on a case-by-case basis, creates no separation of powers problem.
- The Texas statutory plan that encourages arrest for breach of a particular settlement agreement, i.e., arrest for non-criminal (non-)conduct proscribed by the supervision agreement, creates no Due Process problem.
- The Texas statutory plan that compels an SOTP participant to waive his Physician-Patient privilege creates no Due Process problem.
- And, ultimately, that revocation of supervision, based on legally impossible charges, evaluated by the preponderance standard and without a jury, and enforced by ex parte, no-evidence-needed, no-crime-needed capias, is not a civil proceeding that raises a completely preemptive federal question.

Thus, by denying the supplementation (responsive to STATE's amended motion), and by dismissing the appeal, the United States court of appeals has rendered a judgment and opinion that (A) conflicts with (1) Due Process, (2) separation of powers, (3) federal statutory provisions regarding removal, and jurisdiction, generally,

(4) relevant decisions of this Court, (5) relevant decisions of other courts of appeals, and (6) even its own precedent, and (B) has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Remedies and Relief Requested

Tello requests

1. That this Court grant the petition, issue the writ of certiorari and take jurisdiction of this matter.
2. That the judgment of dismissal on appeal be reversed, and, ultimately, that removal be confirmed and, given STATE's breach, that all charges against Tello be ordered dismissed.
3. That he be released pending appeal.
4. That habeas be granted, if the removal matter is overruled, or if it is remanded to the federal trial court for further proceedings.
5. As much discussion on the difference between civil and criminal proceedings as this case may allow.
6. As much discussion on *capias*, i.e., evidence required, basis for, *ex parte* limitations on, jurisdiction, Due Process, etc., as this case may allow.
7. As much discussion on the consequences to STATE of STATE's breach as this case may allow.
8. As much discussion on statutory construction and separation of powers as this case may allow.
9. As much discussion on statutory construction and Due Process as this case may allow.

10. The opportunity to submit a brief on any additional issues identified by this Court.
11. Given the *continuing* uncertainty of Tello's actual location and mailing address, *see* "tax" case, No. 05-90, demonstrated by another relocation in late August, early September, should the appeal of the removed Bond revocation matter, presently pending in the Fifth Circuit, No. 05-10914, be included in this proceeding per Rule 11, whether *sua sponte* or otherwise, and while there may not be a lot more to add, should additional Questions and discussion relevant to those issues be in order, that he be allowed at least 60 days to do so.
12. The non-argument calendar. Oral argument is not expected to aid the resolution of these issues.
13. That costs be taxed to STATE.
14. That the Solicitor General's Office be granted leave to file an amicus brief, if they are so inclined.
15. Any and all other relief at law, in equity or sui generis to which he may show himself justly entitled.

Respectfully submitted,

John Tello
P.O. Box 870983
Mesquite, Texas 75187

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Appendix A—Re: STATE's original motion

Rule 14.1(i)(i)—Appellate Opinion

2005 June 30

United States Court of Appeals

Fifth Circuit

FILED

June 30, 2005

Charles R. Fulbruge III

Clerk

**In the
United States Court of Appeals
for the Fifth Circuit**

Nº 04-11424

Summary Calendar

STATE OF TEXAS,

Plaintiff-Appellee,

VERSUS

JOHN THOMAS TELLO,

Defendant-

Third Party Plaintiff-

Appellant,

VERSUS

HAROLD EAVENSON

SHERIFF, ROCKWALL COUNTY, TEXAS, AND CUSTODIAN

OF JOHN THOMAS TELLO,

Third Party Defendant-

Appellee.

**Appeal from the United States District Court
for the Northern District of Texas**

Nº 3:04-CV-1718-N

[12] Before DAVIS, SMITH, and STEWART,
Circuit Judges.

PER CURIAM:*

John Tello pleaded guilty in Texas state court to two counts of indecency with a child by exposure and one count of possession of child pornography. Adjudication of guilt was deferred, and Tello was sentenced to concurrent five-year terms of deferred-adjudication probation.

When the state moved to revoke probation and for adjudication of guilt, Tello removed the case to federal court and sought habeas corpus relief. The federal district court remanded and denied the habeas application. Tello filed a notice of appeal and motions to supplement the record on appeal and to stay the state proceedings.

Although the district court referred to the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), it correctly noted the lack of federal subject-matter jurisdiction. Moreover, it is plain that "federal jurisdiction never existed." *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994). The state action against Tello was a continuation of his state criminal action. See *McClendon v. State*, 784 S.W.2d 711, 713 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (holding that deferred adjudication of guilt is "part and parcel" of the original criminal plea proceeding); TEX. CODE CRIM. P. art. 42.12 § 5(b). Except in rare cases involving federal defendants or the likelihood of equal-protection problems not applicable here, there is no jurisdictional basis for the removal of a state criminal proceeding.

Because the district court lacked jurisdiction and did

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

not "clearly and affirmatively" rely on a basis for removal other than a lack of jurisdiction, this court lacks jurisdiction to review the remand order. *See Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000); *Bogle*, 24 F.3d at 761; 28 U.S.C. § 1447(c), (d). The remand order will stand. The appeal is DISMISSED.

Absent jurisdiction, the district court's ruling on Tello's habeas corpus application is void. *See Bogle*, 24 F.3d at 762. All of Tello's motions are DENIED.

Rule 14.1(i)(ii)—Additional Orders

2004 November 12—Remand, Denial of Habeas

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

NOV 12 2004
CLERK, U.S. DISTRICT COURT
By _____

Deputy

ORIGINAL
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STATE OF TEXAS,	§
Plaintiff,	§
v.	§ Civil Action No.
JOHN THOMAS TELLO,	§ 3:04-CV-1718-N
Defendant.	§

ORDER

Before the Court are Defendant John Thomas Tello's Notice of Removal, filed August 9, 2004, and his Original Third Party Complaint and Application for Writ of Habeas Corpus, filed September 21, 2004. Because Tello

is the subject of ongoing state prosecution and has presented no grounds sufficient to allow federal interference with that prosecution, the Court sua sponte remands this action to the state district court and denies Tello's application for writ of habeas corpus.

I. BACKGROUND

On March 18, 2004, upon his plea of guilty to two charges of indecency with a child (exposure) and one charge of possession of child pornography, the state district court placed Tello on five years' probation, with a judgment of deferred adjudication entered in each case. *State v. Tello*, Nos. 2-03-279, 2-03-280 & 2-03-451 (382nd Judicial District Court of Rockwall County). On July 15, 2004, the Criminal District Attorney for Rockwall County moved to revoke Tello's probation in each case because of violations alleged in the motions.

ORDER — PAGE 1 [12]

Apparently, Tello was arrested and is incarcerated pending his revocation hearing.

II. REMOVAL WAS NOT PROPER

As grounds for removal, Tello alleges that: (1) his probation officer has retaliated against him; (2) his probation officer induced and caused the violation of his probation; (3) his probation officer has self-designated herself as his sex offender treatment program counselor thereby violating his rights against self-incrimination and unlawful search and seizure; (4) the state court, as a party to the probation agreement, should not have the authority to construe the agreement, and; (5) an improper choice of laws has been applied to his case. He asks this court to, inter alia, order his immediate release, deny the motion to revoke his probation and order that his probation officer be replaced.

The Court concludes that Tello has presented no valid

basis for federal removal jurisdiction. Under the *Younger* abstention doctrine, a federal court must abstain from interfering with ongoing state criminal proceedings, except in the most extraordinary circumstances and upon a clear showing of both great and immediate harm. See *Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994); *Younger v. Harris*, 401 U.S. 37, 43-45, (1971); ¹ *Davis v. Zain*, 79 F.3d 18,19 (5th Cir. 1996). Tello has made no such showing. He presents only a single argument as to why the pending state adjudication would be inadequate in his case. That argument – that a state court lacks authority to construe its own probation orders because it is “a necessary party to a probation agreement” – misconstrues the nature of both probation orders and courts. Mr. Tello’s probation was a sentence, not a contract, and any “agreement” surrounding his guilty plea was between him and the prosecution, not between

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him and the court.

28 U.S.C. § 1443 does not provide this Court with jurisdiction over Tello’s case. Removal under section 1443(1) is only proper when a litigant shows that (1) an allegedly violated right arises under a federal law “providing for specific civil rights stated in terms of racial equality” and (2) the litigant cannot enforce that right in state court. See *State of Georgia v. Rachel*, 384 U.S. 780, 792-800 (1966); *Williams v. State of Mississippi*, 608 F.2d 1021, 1022 (5th Cir. 1979), *cert. denied*, 449 U.S. 804 (1980). A state civil action or criminal prosecution that does not violate a specific federal law protecting against racial discrimination is not subject to removal under section 1443(1). *Johnson v. Mississippi*, 421 U.S. 213, 227-28 (1975); *Texas v. Gulf Water Benefaction Co.*, 679

¹ As such in original.

F.2d 85, 86 (5th Cir.1982).² Although some of Tello's claims could be liberally construed as allegations of civil rights violations, none are based on racial discrimination. Consequently, federal removal jurisdiction under 28 U.S.C. § 1443 is not proper. Removal under 28 U.S.C. § 1443(2) is also improper. The reach of section 1443(2) is "limited to federal officers and those authorized to act for them or under them." *Varney*, 446 F.2d at 1369 (citing *City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 814-15 (1966)). Tello makes no claim that he is a federal officer or that this suit arises out of efforts to enforce civil rights laws in such a capacity.

Tello's other proposed sources of jurisdiction do not authorize this Court to hear his case. 28 U.S.C. §§ 1441 and 1444 are procedural sections that do not provide an independent source of jurisdiction. Section 1333 grants jurisdiction only for cases arising on the high seas

ORDER — PAGE 3 [14]

or in interstate waterways. The reach of sections 1331 and 1367 is constrained by the *Younger* abstention doctrine, as explained above.

III. TELLO IS NOT ENTITLED TO A WRIT OF HABEAS CORPUS

Federal habeas corpus relief is only available when the applicant has exhausted state remedies, state corrective processes do not exist, or state corrective processes are inadequate to vindicate the rights he asserts. See 28 U.S.C. § 2254(b)(1). Such requirements are "designed to protect the state courts' role in the enforcement of federal law and prevent the disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). In order to exhaust, a petitioner must fairly present all of his claims to the state's highest court. *Deters*

² As such in original.

v. Collins, 985 F.2d 789, 795 (5th Cir. 1993).

In his habeas corpus application, as with his notice of removal, Tello's only argument going to the inadequacy of state proceedings is the assertion that state courts generally lack authority to construe their own probation orders. This assertion is meritless for the reasons given above. Setting it aside, Tello presents no arguments at all as to why he would be harmed if this matter is adjudicated in state court rather than federal court.

Tello argues that the exhaustion requirement "do[es] not appear to apply," because "this matter is a deferred adjudication." Construing this argument liberally in his favor, Tello seems to be suggesting that the judgment of deferred adjudication satisfies the requirements of section 2254(b)(1). It does not, for two reasons. First, Tello has not exhausted his appeals in state court. Second, any finality that might adhere to a judgment of deferred adjudication is irrelevant in this case, because Tello seeks relief from an ongoing proceeding in which that

ORDER — PAGE 4 [15]

judgment is threatened with revocation. He presents no valid reasons to doubt the competence of the state tribunal to adjudicate his claims and objections in that proceeding. In such circumstances, this Court is not authorized to interfere.

Accordingly, the Petition for Writ of Habeas Corpus is denied, and removal is improper. This case is hereby remanded to the 382nd Judicial District Court of Rockwall County, Texas.

SIGNED this 11 day of November, 2004.

/s/ David C. Godbey

David C. Godbey
United States District Judge

ORDER — PAGE 5

Rule 14.1(i)(iii)—Any Rehearing

No rehearing sought or granted.

Rule 14.1(i)(iv)—Any Judgment of different date

No judgment of date different from the opinion.

Rule 14.1(i)(v)—Statutes and Rules

See language included in the petition.

Rule 14.1(i)(vi)—Additional Essential Materials

2004 March 18—Supervision Agreement

[Note: There are three cases: 2-03-279, -280 and -451.
The substance of these agreements is the exact same.]

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
MAR 18 2004

AM PM
7|8|9|10|11|12|1|2|3|4|5|6

NO. 2-03-279

THE STATE OF TEXAS	§	382ND JUDICIAL
	§	DISTRICT
VS.	§	COURT IN AND FOR
	§	ROCKWALL COUNTY,
JOHN THOMAS TELLO	§	TEXAS

DEFERRED
COMMUNITY SUPERVISION JUDGMENT

JUDGE PRESIDING: Brett Hall
JUDGMENT DATE: March 18, 2004

ATTORNEY FOR
STATE: David E. Rakow/Joel Littlefield
ATTORNEY FOR
DEFENDANT: Brian Blessing

OFFENSE: INDECENCY WITH A CHILD-EXPOSURE

DATE OFFENSE COMMITTED:
March 30, 2003

DEGREE: F3 VIOLATION OF: 21.11 TEXAS PENAL
CODE

CHARGING INSTRUMENT: INDICTMENT
PLEA: GUILTY

TERMS OF PLEA BARGAIN: FIVE (5) YEARS
DEFERRED COMMUNITY SUPERVISION; \$500.00
FINE; \$213.00 COURT COST; \$25.00 CRIMESTOPPERS
FEE; \$25.00 TIME PAYMENT FEE

PLEA TO ENHANCEMENT(S): N/A
FINDINGS ON ENHANCEMENT(S): N/A
FINDINGS ON USE OF DEADLY WEAPON: N/A

DATE SENTENCE IMPOSED: COURT COST: \$213.00
March 18, 2004

ATTY. FEES: \$

FINE: \$500.00

RESTITUTION: \$

CRIMESTOPPER FEE: \$ 25.00

LAB FEE: \$

TIME PAYMENT: \$25.00

PUNISHMENT: FIVE (5) years
PLACE OF CONFINEMENT: DEFERRED
DATE TO COMMENCE: March 18, 2004
TIME CREDITED:

CONCURRENT UNLESS OTHERWISE SPECIFIED:

[12]

On this the ³ March 18, 2004, the ⁴ above-numbered and entitled cause was regularly reached and called for trial, when came the State of Texas by and through her Prosecuting Attorney, and the Defendant, JOHN THOMAS TELLO, appeared in person and by his/her attorney, Brian Blessing, thereupon the Prosecuting Attorney announced ready for trial, and the Defendant, in person and in open court pleaded "GUILTY" to the charge of INDECENCY WITH A CHILD-EXPOSURE, thereupon the defendant was admonished by the Court of the consequences of said plea, including the minimum and maximum punishment, and the said Defendant persisted in pleading; and it plainly appearing to the Court that the said Defendant is mentally competent and that he/she is not influenced in making said plea by any consideration of fear, or by persuasion of delusive hope of pardon prompting him/her to confess his/her guilt, the said plea of "GUILTY" is by the Court received and now entered of record in the minutes of the Court as the plea herein of said Defendant. Thereupon the Defendant, his counsel, and the Prosecuting Attorney announced in open Court that they, and each of them, agree in writing to waive a jury in this cause and to submit this cause to the Court. The Court having heard all of the evidence for the State and the Defendant, and finding that the evidence substantiates the Defendant's guilt as confessed by him/her for the offense of INDECENCY WITH A CHILD-EXPOSURE, is of the opinion that the best interest of society and the Defendant will be served by deferring further proceedings without entering an adjudication of guilt and placing the Defendant on Community Supervision.

IT IS THEREFORE DECREED by the Court that on this the March 18, 2004, the evidence against the said

³ As such in original.

⁴ As such in original.

Defendant, JOHN THOMAS TELLO, substantiates the Defendant's guilt as charged in the INDICTMENT in this cause. It being in the best interest of society and the Defendant, further proceedings are deferred for a period of FIVE (5) year(s). The State does have and recover of and from said Defendant all costs in this proceeding incurred, for which let execution issue.-[13]

However, on this the March 18, 2004, the Court after due consideration is of the opinion, and so finds, that the Defendant, JOHN THOMAS TELLO, is eligible for community supervision under the provisions of Article 42.12 Texas Code of Criminal Procedure, and is further of the opinion, and so finds, that the ends of justice and the best interests of both society and the Defendant will be served if further proceedings are deferred without entering an adjudication of guilt and the Defendant is placed on Community Supervision.

IT IS THEREFORE ORDERED by the Court that the Defendant, JOHN THOMAS TELLO, be and is hereby placed on Community Supervision for a term of FIVE (5) years beginning on this date under the supervision of the Court and the duly appointed and acting Officer of the Department of Community Supervision and Corrections of Rockwall County, Texas, subject to the following conditions of community supervision, and further, the Defendant is ORDERED that during the term of community supervision he/she shall:

- (1) Commit no offense against the laws of this State or any other State, or of the United States, or any political subdivision thereof;
- (2) Avoid injurious or vicious habits (including the use of illicit or habit-forming drugs and alcoholic beverages); submit to a urinalysis test given by or under the direction of the Department of Community Supervision and Correct (cost of the urinalysis to be paid by the defendant);

- (3) Avoid persons or places of disreputable or harmful character including the act of frequenting or going about places where intoxicating beverages are sold; specifically avoid association with any person previously convicted of a crime or currently on community supervision, or presence at any location where a criminal act is being committed;
- (4) Report to the Department of Community Supervision and Corrections weekly, twice monthly, or monthly, as scheduled by the Community Supervision Officer;
- (5) Permit the Community Supervision Officer to visit you at home, place of employment, or elsewhere;
- (6) Work faithfully at suitable employment as far as possible, subject to the approval of the Court and/or Community [14] Supervision Officer;
- (7) Do not change employment or place of residence without the permission of the Court and/or Community Supervision Officer;
- (8) Report in writing to the Community Supervision Officer any change of address, employment, marital status, arrests, and all sources and amounts of income or money received within forty-eight (48) hours;
- (9) Remain within a specified area, to-wit: Rockwall County, Texas, and all contiguous counties, unless permitted in writing to depart by the Court and/or Community Supervision Officer;
- (10) Pay a FINE in the amount of: \$ 500.00
RESTITUTION/REPARATION in the amount of: \$
Appointed ATTORNEY FEES in the amount of: \$
COURT COSTS in the amount of: \$ 213.00
CRIMESTOPPER FEE: \$ 25.00
LABORATORY FEE: \$
TIME PAYMENT FEE: \$ 25.00
The TOTAL amount of \$763.00 is to be paid as follows:

Court cost of \$213.00 is to be paid within 60 days of this Judgment; Crimestopper Fee of \$25.00 is to be paid within 30 days of this Judgment; Time payment fee of \$25.00 is to be paid within 30 days of this Judgment;

The balance is to be paid in monthly installments of \$50.00 each month beginning June 1, 2004 UNTIL PAID IN FULL; ALSO: COMMUNITY SUPERVISION SUPERVISORY FEE in the amount of \$50.00 per month each month during the term of community supervision. (Due on or before the 1st day of each month beginning April 1, 2004; ⁵

- (11) Support any dependents that you now have or that you may acquire during the term of this community supervision;
- (12) Do not own or possess any firearm at any time;
- (13) Attend and complete Alcohol/Drug Assessment Program within 45 days and follow all recommendations of that assessment; (COSTS TO BE PAID BY DEFENDANT)
- (14) Perform 200 hours of community service restitution at the nonprofit, charitable or governmental organization assigned by your adult supervision officer in charge of your case at a rate of no less than 10 hours per month beginning within 30 days from the date of judgment. ⁶
- (15) Obtain a high school or GED within one year of this judgment;
- (16) Participate in the following program(s) and pay the fee as assessed for said program(s) as directed by the Court/Community [15] Supervision & Corrections: ⁷

⁵ "y" presumed.

⁶ "x" presumed.

⁷ Department? Officer?

- ()Attend and successfully complete a TCADA approved DWI Repeat Offender Intervention ⁸ Program within 360 days of the date of this judgment;
- ()Attend and successfully complete a TCADA approved Texas Drug Offender Education Program within 180 days of the date of this judgment;
- ()Attend and successfully complete a Life Skills Class as approved by the Court within 360 days of the date of this judgment;
- ()Attend and successfully complete a Parenting Class as approved by the Court within 360 days of the date of this judgment;
- ()Attend and successfully complete an Anger Management Program as approved by the Court within 360 days of the date of this judgment;
- ()Attend and successfully an Out-Patient Substance Abuse Program as directed by the Rockwall County Community Supervision and Corrections Department, UNLESS ALCOHOL AND DRUG EVALUATION RECOMMENDS IN-PATIENT TREATMENT;
- ()Participate in an In-Patient Treatment Facility, _____ per the attached order and obey all rules and regulations of the facility, follow all guideline and instructions until successfully discharged or until further ordered by the Court and follow all aftercare recommendations;
- ()Submit to a psychological/psychiatric evaluation within 90 days of this order as approved by the Supervision Officer and complete any treatment recommended as a result of that evaluation;
- ()Participate in the Intensive Supervision Program for a period of _____;
- ()Attend Alcoholics/Narcotics Anonymous ____ times per week for the term of supervision;

⁸ As such in original.

() Participate in the Restitution Center Program per the attached order;

() Participate in the SAFP Program per attached order;

() Enroll in an English as a second language course within 60 days of this order and provide proof of completion of said course to the supervision officer; [16]

() Defendant is to attend and successfully complete a 24-week substance abuse class as directed by the Rockwall County Community Supervision and Corrections Department.

FOLLOWING CONDITIONS APPLY IF CHECKED:

() (17) Attend a Victim Impact Panel session as directed by the Community Supervision and Corrections Department.

() (18) The defendant is to have a device installed, on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, that uses a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected in the breath of the operator and the defendant is not to operate any motor vehicle that is not equipped with that device.

(✓) (19) Have no direct communication with the victim, Brandon Melton, and his/her family and maintain a distance of at least 50 yards from the victim's residence or place of employment;

() (20) Serve ____ days in the Rockwall County Detention Center to begin ____, (Work release), yes ____ no ____;

(✓) (21) Defendant is to obey and abide by all standard terms and conditions of Sex Offender Conditions. See Attachment.

() (22)

() (23) [17]

YOU ARE HEREBY advised that under the laws of this State, the Court shall determine the terms and conditions of your community supervision, and may at any time during the period of community supervision, alter or modify the conditions of your community supervision. The Court also has the authority at any time during the period of community supervision to revoke your community supervision for violation of any of the conditions of your community supervision set out above.

SIGNED this 18 day of March, 2004.

/s/ Brett Hall

PRESIDING JUDGE
382ND JUDICIAL DISTRICT
COURT IN AND FOR
ROCKWALL COUNTY, TEXAS

I, JOHN THOMAS TELLO, the undersigned Defendant, have received a copy of the terms of community supervision on this 18 day of March, 2004.

/s/ John Thomas Tello

Defendant

WITNESSED BY:

/s/ ?

[fingerprint]

RIGHT ROLLED THUMB TAKEN BY: Sue Hill

[18]

SEX OFFENDER CONDITIONS

Register with your local municipal or county law enforcement agency as a sex offender within seven (7) days. If intend to move, while on probation, to a new residence you are to report in person to the Rockwall County Community Supervision and Corrections Department at least seven (7) days prior to the anticipated move for further reporting instructions.

NOTE: It is your duty to register with the local law enforcement in the area where you reside or intend to reside for more than seven (7) days for the duration for the duration of your Community Supervision and **FOR THE REST OF YOUR LIFE** if the probated offense is: (a) Indecency with a Child/Sexual Contact, (b)Aggravated ⁹ Sexual Assault, or (c)Sexual ¹⁰ Performance by a Child.

Note: It is your duty to register with the local law enforcement in the area where you reside or intend to reside for more than seven (7) days for the duration of your Community Supervision **PLUS TEN (10) YEARS AFTER DISCHARGE FROM COMMUNITY SUPERVISION** if the sex offense is not one of the above listed.

Submit to a clinical ¹¹ assessment and treatment program with a registered sex offender treatment provider (including but not limited to a psychological, psychiatric, psychophysiological testing, and/or group and individual therapy) to wit; _____ or as designated by the adult supervision officer in charge of your case within 60 days from the date of this judgment and pay all costs of said program and testing. Participate in good faith in the assessment and treatment process, attend all sessions and successfully complete the sex offender program.

⁹ As such in original.

¹⁰ As such in original.

¹¹ *Clinical, not investigative, but clinical! But see [C-33, -44].*

Complete a clinical polygraph examination every six (6) months or as directed by the therapist ¹² with a Court approved polygrapher.

Have no contact of any kind with children under the age of seventeen (17) unless under the supervision of another adult approved by the therapist, Court, and the supervision officer in charge of your case.

Do not go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility: [18]

Do not supervise or participate in any program or job that includes participants /recipients seventeen (17) years of age or younger that regularly provides athletic, civic, or cultural activities.

Do not reside in any household with children under the age of seventeen (17) until such residence is approved in writing by the sex offender program therapist, the Court, and the adult supervision officer in charge of your case.

Do not reside in any building located within 1,000 feet of school, playground, or child care center. ¹²

Do not enter or patronize places where pornographic materials are sold. Do not own or possess pornographic materials or enter sexually oriented establishments, i.e. adult bookstores, topless bars, massage/tanning parlors, sex shops, or adult movie theaters.

Pay all the costs of therapy and medical treatment incurred by the victim as a result of the criminal misconduct.

¹² *Clinical, not supervision-violation-finding, but clinical! Therapist, not probation officer, but therapist! But see [C-33, -44].*

¹³ *But cf. Art. 42.12 § 13B(i).*

Pay a sex offender supervision fee in the amount of \$__ payable at \$5.00 per month payable to the Rockwall Community Supervision & Corrections Department on or before the first day of each month beginning hereafter until paid in full.

DNA Submission: Submit a blood sample or other specimen to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record of the defendant, Article 42.12 Sec. 11(a) (22).

The defendant shall not possess, acquire, obtain, retain, or review journalistic, video, photographic, electronic, compact disk, computer generated or computer originated material, or material generated by an individual or material that is sent or received by electronic mail that is sexually oriented and/or portrays nudity of a child or of an adult;¹⁴

The defendant shall not access, participate in or have any contact with the Internet, World Wide Web, or electronic mail;

The defendant shall not enter into or maintain any type of agreement with any individual or entity for the purpose of obtaining access to the Internet, World Wide Web, or electronic mail; [19]

The defendant is to permit a supervision officer into the defendant's residence, and allow a reasonable review of any journalistic, video, electronic, compact disk, computer generated or computer originated materials, electronic mail, or photographs in the home as requested.

¹⁴ End punctuation shift to "," in the original.

2004 July 15—STATE's Original Motion

FILED FOR RECORD
ROCKWALL COUNTY
2004 JUL 15 AM 9:13
KAY MCDANIEL
DISTRICT CLERK
BY _____ DEPUTY

CAUSE NO. 2-03-279

THE STATE OF TEXAS § IN THE 382ND JUDICIAL
§ DISTRICT COURT
VS. §
§ ROCKWALL COUNTY,
JOHN THOMAS TELLO § TEXAS

**MOTION TO REVOKE UNADJUDICATED
PROBATION AND REQUEST FOR FINAL
ADJUDICATION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the State of Texas by and through Galen Ray Sumrow the duly elected Criminal District Attorney for Rockwall County, State of Texas, and would show the Court that heretofore on the 18TH day of **MARCH, 2004**, the Court entered a finding that the evidence substantiated the above named defendant's guilt of the offense of **INDECENCY WITH A CHILD-EXPOSURE** and the Court then deferred further proceedings without entering an adjudication of guilt, and placed the defendant on community supervision for a period of **FIVE (5) YEARS** conditioned among other things that he/she:

CONDITION # 21 - Do not go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade

facility.

THE STATE WOULD FURTHER SHOW that the defendant herein did then and there violate the terms and conditions of said probation in that: [12]

IN VIOLATION OF CONDITION #21 -On May 26, 2004, the defendant entered the premises of Lighthouse Private School at 5600 FM 3097 in Rockwall, Texas, a place where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool or video arcade facility.

PREMISES CONSIDERED, the State moves the Court to cause a warrant to be issued for arrest, hearing to be held, and that unadjudicated probation be revoked and final adjudication be entered in this cause, as evidence and judgment of the Court may issue a warrant.

Respectfully submitted,

/s/ G. R. Sumrow
GALEN RAY SUMROW
CRIMINAL DISTRICT ATTORNEY
ROCKWALL COUNTY, TEXAS

BY: /s/ ? [Littlefield is presumed]
Assistant District Attorney

FDTELLO21SH

2004 July 15—The Capias

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
JUL 15 2004

AM PM
7|8|9|10|11|12|1|2|3|4|5|6

CAUSE NO. 2-03-279

THE STATE OF TEXAS § IN THE 382ND JUDICIAL
 § DISTRICT COURT
VS. §
 § ROCKWALL COUNTY,
JOHN THOMAS TELLO § TEXAS

ORDER - COMMITMENT

IT IS ORDERED that the District Clerk will issue a
capias for the arrest of the above-named Defendant,
directing that he/she be held to answer instanter to this
Court for violations of the terms and conditions of his/her
probation therein.

SIGNED AND ORDERED ENTERED of record this
15 day of July, 2004.

Sitting for

/s/ H. Gardner, Jr. ?

Brett Hall, Judge
382nd Judicial District Court
Rockwall County, Texas

Appendix B—Re: STATE's amended motion

[Note: This was filed on or about 7 January 2005.]

2005 January 7—STATE's Amended Motion

CAUSE NO. 2-03-279

THE STATE OF TEXAS	§ IN THE 382ND JUDICIAL
	§ DISTRICT COURT
VS.	§
	§ ROCKWALL COUNTY,
JOHN THOMAS TELLO	§ TEXAS

**AMENDED
MOTION TO REVOKE UNADJUDICATED
PROBATION AND REQUEST FOR FINAL
ADJUDICATION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the State of Texas by and through Galen Ray Sumrow the duly elected Criminal District Attorney for Rockwall County, State of Texas, and would show the Court that heretofore on the 18TH day of **MARCH, 2004**, the Court entered a finding that the evidence substantiated the above named defendant's guilt of the offense of **INDECENCY WITH A CHILD-EXPOSURE** and the Court then deferred further proceedings without entering an adjudication of guilt, and placed the defendant on community supervision for a period of **FIVE (5) YEARS** conditioned among other things that he/she:

CONDITION #21 - Do not go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, daycare facility, playground, public or private youth center, public swimming pool, or video arcade facility.

Submit to a clinical ¹ assessment and treatment program with a registered sex offender treatment provider (including but not limited to a psychological, psychiatric, psycho physiological testing, and/or group and individual therapy) or as designated by the adult supervision officer in charge of your case within 60 days from the date of this judgment and pay all costs of said program and testing. Participate in good faith in the assessment and treatment process, attend all sessions and successfully complete the sex offender program. [12]

THE STATE WOULD FURTHER SHOW that the defendant herein did then and there violate the terms and conditions of said probation in that:

IN VIOLATION OF CONDITION #21 -On May 26, 2004, the defendant entered the premises of Lighthouse Private School at 5600 FM 3097 in Rockwall, Texas, a place where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool or video arcade facility.

IN VIOLATION OF CONDITION #21 -On May 27, 2004, the defendant was unsuccessfully discharged from the treatment program with Al Merchant, LCSW, LCDC, a registered sex offender treatment provider for lack of treatment progress, being disruption to group and keeping secrets.

IN VIOLATION OF CONDITION #21 -On June 28, 2004, the defendant entered the premises of Ridgepointe Athletic Center at 811 Yellow Jacket Lane in Rockwall, Texas, a place where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool or video arcade facility.

PREMISES CONSIDERED, the State moves the

¹ *Clinical, not investigative, but clinical! But see [C-33, -44].*

Court to cause a warrant to be issued for arrest, hearing to be held, and that unadjudicated probation be revoked and final adjudication be entered in this cause, as evidence and judgment of the Court may issue a warrant.

Respectfully submitted,

/s/ G. R. Sumrow
GALEN RAY SUMROW
CRIMINAL DISTRICT ATTORNEY
ROCKWALL COUNTY, TEXAS

BY: /s/ Louis W. Conradt, Jr.
Assistant District Attorney

FDTELLO21SH

Appendix C—Direct Appeal, State Courts

[Note: Appendices C, D, and E contain information available by judicial notice. These documents are part of the identified state court Records, but have not previously been made part of the federal trial or appellate Record in the immediate case.]

2005 February 17—Revocation Hearing

[Note: All bold emphasis in transcripts is added.]

1

1 REPORTER'S RECORD

2 VOLUME 2 OF 4 VOLUMES

3 TRIAL COURT CAUSE NO. 2-03-279

TRIAL COURT CAUSE NO. 2-03-280

4 TRIAL COURT CAUSE NO. 2-03-451

5 STATE OF TEXAS) IN THE DISTRICT
) COURT

6)
VERSUS) ROCKWALL COUNTY,
) TEXAS

7)
8 JOHN THOMAS) 382ND JUDICIAL
TELLO) DISTRICT

11 HEARING ON MOTIONS TO REVOKE

On the 17th day of February, 2005, the above-entitled and numbered cause came on for hearing before the Honorable Brett Hall, Judge presiding of the 382nd Judicial District Court of Rockwall County, Texas, at which time the following proceedings were had.

Original "zone" charge—*work-exception*

Sherry Epp - Direct by Mr. Conradt

42

1 MR. CONRADT: Sherry Epp.

18 SHERRY EPP,

19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. CONRADT:

22 Q. Would you state your name to the Court,
23 please, ma'am?

24 A. Sherry Epp.

25 Q. For the benefit of the court reporter, would

Sherry Epp - Direct by Mr. Conradt

43

1 you spell your last name?

2 A. E-P-P.

3 Q. Miss Epp, are you employed?

4 A. Yes.

5 Q. By whom?

6 A. By Oak Hill Day School.

7 Q. And how long have you worked there?

8 A. A month.

9 Q. A month?

10 A. Uh-huh.

11 Q. Prior to working at Oak Hill, were you
12 employed?

13 A. Yes.

14 Q. Where?

15 A. The Lighthouse Private School.

16 Q. And where is that located?

17 A. I was employed at both, one on Lakeshore
Drive

18 and one on Horizon Road.

19 Q. Okay. Which one is at 5600 FM 3097?

20 A. That's Horizon Road.

21 Q. Horizon?

22 A. Uh-huh.

23 Q. Is that located here in Rockwall County,
24 Texas?
25 A. Uh-huh.

Sherry Epp - Direct by Mr. Conradt

44

1 Q. What type of facility is that daycare center?

2 A. It's a private pre-school.

3 Q. Private pre-school?

4 A. Uh-huh.

5 Q. And how old are the kids that go there?

6 A. Six weeks to 12 years.

7 Q. And how long did you work at that facility,
8 the one on Horizon?

9 A. At that location?

10 Q. Yes, ma'am.

11 A. Three years.

12 Q. Do you know a person by the name of John
13 Thomas Tello?

14 A. (Witness shakes head)

15 Q. Do you know of him?

16 A. Uh-huh.

17 Q. Do you see him here in the courtroom today?

18 A. Yes.

19 Q. Would you point him out, please?

20 A. Right there (indicating)

21 MR. CONRADT: Your Honor, could you let
22 the record reflect the witness has identified the
23 defendant in open court?

24 THE COURT: All right. So reflected.

25 Q. (By Mr. Conradt) Were you employed at the

Sherry Epp - Direct by Mr. Conradt

45

1 Horizon location of The Lighthouse Private School on
2 May the 26th of 2004?

3 A. Yes.

4 Q. Okay. On that date, if you recall, do you
5 know whether or not the defendant came onto the

6 premises?
7 A. I do not know the specific date that I saw him
8 on the premises.
9 Q. But you did see him there at some particular
10 date?
11 A. Yes.
12 Q. All right. Do you know why he was there
at
13 the -
14 A. He was dropping off air filters.
15 Q. Do you know whether or not The
Lighthouse
16 Private School had a contract with the
defendant's
17 business to do that, or do you know?
18 A. I don't know that there was a contract,
but we
19 used to always get the filters from him.
20 Q. Okay. At the time you saw him, whatever date
21 that was, were there school children on the premises
at
22 the time he was?
23 A. Yes.
24 MR. CONRADT: Pass the witness, Your
25 Honor.

Sherry Epp - Cross by Mr. Blessing

46

1 CROSS-EXAMINATION
2 BY MR. BLESSING:
3 Q. How many times have you seen him on the
4 premises, Ms. Epp, approximately?
5 A. Well, I mean, over a period of years, I saw
6 him lots of times.
7 Q. Okay. And do you know the nature of the
8 charges that he was on probation?
9 A. Yes.
10 Q. Do you know that, or have you learned that?

11 A. I only saw him the one time after those papers
12 had been brought to me to put in the file. I'll say
13 that.

14 Q. Okay. And when you learned of that, was that
15 before or after you saw him on the premises?

16 A. Ask me again.

17 Q. Did you see him on the premises after you had
18 the paperwork?

19 A. Yes.

20 Q. Okay. And he's alleged to have entered onto
21 the premises, I believe, May the 26th of 2004. So you
22 got the papers and knew of his probation prior to May
23 the 26th of 2004; is that correct?

24 A. Uh-huh.

25 Q. And the day that you saw him, after you
knew

Alan Schwerdt - Direct by Mr. Conradt

47

1 of that, do you recall how long he was on the
premises?

2 A. Less than a minute.

3 Q. Okay. And did he have someone else with him,
4 if you recall?

5 A. Not that I saw. I mean --

6 Q. Did he have any -- any contact with any of the
7 children on the premises?

8 A. No.

9 MR. BLESSING: No further questions.

10 MR. CONRADT: State has no other
11 questions of this witness, Your Honor. May she be
12 finally excused?

13 THE COURT: Any objection?

14 MR. BLESSING: No.

15 THE COURT: You're excused. Thank you.

16 Who is your next witness?

MARY ANN GILBERT, CSR, RMR, RDR

382nd Judicial District Court

Second "zone" charge—work-exception

17 MR. CONRADT: Your Honor the State would
18 call Alan Schwerdt.

19 May I proceed?

20 THE COURT: You may.

21 ALAN LEE SCHWERDT

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. CONRADT:

25 Q. Would you state your name for the Court,

Alan Schwerdt - Direct by Mr. Conradt

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1 please, sir?

2 A. Alan Lee Schwerdt.

3 Q. And would you help the court reporter, please,
4 sir, and spell your last name?

5 A. Last name? It's S-C-H-W-E-R-D-T. D as in
6 David, T as in Tom.

7 Q. Mr. Schwerdt, are you employed?

8 A. Yes, sir.

9 Q. Whereabouts?

10 A. Ridge Pointe Athletic Club in Rockwall.

11 Q. What do you do there?

12 A. Personal trainer.

13 Q. And where is Ridge Pointe Athletic Center
14 located?

15 A. 811 Yellow Jacket.

16 Q. Is that here in the City of Rockwall?

17 A. Yes.

18 Q. Rockwall County, Texas?

19 A. Yes.

20 Q. How long have you worked there?

21 A. Six seven years.

22 Q. And you were employed there on June the 28th
23 of 2004?

24 A. Yes.

25 Q. On that date, did you have an occasion to see

Alan Schwerdt - Direct by Mr. Conradt 49

1 a person on the premises at 811 Yellow Jacket Lane
2 known to you as John Thomas Tello?

3 A. Yes, sir.

4 Q. Do you see that person here in the courtroom
5 today?

6 A. Yes, sir.

7 Q. Would you point him out, please?

8 A. In the orange right there (indicating)

9 MR. CONRADT: Your Honor, could you let
10 the record reflect the witness has identified the
11 defendant in open court?

12 THE COURT: So reflected.

13 Q. (By Mr. Conradt) What type of facility is
14 Ridge Pointe Athletic?

15 A. A fitness, weight lifting, weight training.

16 Q. Are there any daycare centers or facilities
17 there in the --

18 A. Yes, sir.

19 Q. And where is that located?

20 A. Within the building?

21 Q. Yes, sir.

22 A. I guess the southwest corner inside there.

23 Q. And what age kids stay there?

24 A. Six months to 12 years.

25 Q. Do you know -- on June the 28th of last
year,

Alan Schwerdt - Cross by Mr. Blessing 50

1 did you see the defendant at Ridge Pointe
Athletic

2 Center on that date?

3 A. Yes, sir.

4 Q. Where did you see him?

5 A. He'd come in stating that he was
6 changing out
7 the filters. He's our filter service guy.
8 Q. Do you recall what time?
9 A. It would have been morning time.
10 Q. Any children on the premises at the time in
11 the daycare center, to your knowledge?
12 A. Oh, yeah. It's always full.
13 Q. Full?
14 A. Between those hours.
15 MR. CONRADT: Pass the witness, Your
16 Honor.
17 CROSS-EXAMINATION
18 BY MR. BLESSING:
19 Q. Do you know how long Mr. Tello was
20 there that
21 day?
22 A. Probably 20, 30 minutes, maybe, at the
23 most.
24 Q. Do you know if he ever went into the daycare
25 center?
26 A. No, sir, I didn't see him enter there.
27 Q. And children are there all day. Is that what
28 you say?

Alan Schwerdt - Cross by Mr. Blessing

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1 A. In the morning from 8:00 till noon, and then
2 it opens back up from 4:00 to 8:00 at night.
3 Q. And it's always full. Is that your testimony?
4 A. During the morning, yes.
5 Q. When you say full, how many children are you
6 talking about?
7 A. Eight. Probably 8 to 15.
8 Q. Are they supervised?
9 A. Yes, sir.
10 Q. Now, the bulk of the athletic center is you
11 can't even work out if you're by yourself if you're

12 under a certain age; is that correct?
13 A. Right.
14 Q. What is that age?
15 A. You have to be 12, at least, to be working out
16 in the facility.
17 Q. Otherwise, you've got to have a parent?
18 A. Anywhere between 12 to 16, you have to have
a
19 parent with you.
20 Q. So 12 to 16, you've got to have a parent?
21 A. To be on the weight training floor, yes, sir.
22 Q. So you've got to be at least 12 to even be
23 working out.
24 A. Right.
25 Q. And from 12 to 16, you've got to have your

Al Merchant - Direct by Mr. Conradt

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1 parent there.
2 A. They have to be there, yes, sir.
3 MR. BLESSING: That's all I have.
4 MR. CONRADT: State has no other
5 questions of this witness, Your Honor. May he be
6 finally excused?
7 THE COURT: Any objection?
8 MR. BLESSING: None.
9 THE COURT: He's excused.
10 Next witness?

MARY ANN GILBERT, CSR, RMR, RDR
382nd Judicial District Court

Third charge—"unsuccessful dismissal" from group

11 MR. CONRADT: Your Honor, the State would
12 call Al Merchant.

13 THE COURT: Sir, if you'll take the stand
14 right here, please.

15 MR. CONRADT: May I proceed?

16 THE COURT: Yes, sir.

17 AL MERCHANT,

18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. CONRADT:

21 Q. Would you state your name to the Court,
22 please, sir?

23 A. It's Al Merchant.

24 Q. Mr. Merchant, are you employed?

25 A. Yes.

Al Merchant - Direct by Mr. Conradt

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1 Q. By whom?

2 A. Self-employed.

3 Q. What do you do?

4 A. I have a private practice, and also I have a
5 sex offender treatment program.

6 Q. What type of private practice?

7 A. Private practice, I see a number of people who
8 refer for different types of problems. And then the
9 sex offender program, I deal specifically with sex
10 offenders who are referred.

11 Q. Do you hold any licenses from the State of
12 Texas?

13 A. Yes, I have three different licenses. I have
14 a LCSW. That's the licensed clinical social worker
15 degree which enables you to engage in private
practice

16 in the State of Texas.

17 I'm also a registered sex offender

18 treatment provider for the State of Texas, and I'm
also

19 a licensed chemical dependency counselor.

20 Q. And how long have you held those licenses?

21 A. The -- let's see, the LCSW since approximately
22 1989, roughly. The RSOTP, which is the registered
sex

23 offender treatment provider license, I think since

24 approximately 1990. I've been working with sex

25 offenders since 1986. And the LCDC is -- again, I

Al Merchant - Direct by Mr. Conradt

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1 think it's from approximately 1990.

2 Q. Where is your office located?

3 A. It's in Dallas, Texas, near the intersection
4 of Central Expressway and Forest Lane.

5 Q. Are you one of the providers for sex offender
6 treatment for Rockwall County Community
Supervision

7 Department?

8 A. Yes.

9 Q. And how long have you been associated with
the

10 Community Supervision Department here in
Rockwall?

11 A. I think probably over the last -- I would say
12 over the last two or three years, I've gotten **referrals**
13 from Rockwall County. And before that, periodically I
14 would receive **referrals** since I've been in practice.

15 Q. One of the referrals, let me call your
16 attention to, was John Thomas Tello; is that
correct?

17 A. That's correct.

[p.54, line 18, to p.55, line 1, is MERCHANT's
identification of Tello]

2 Q. (By Mr. Conradt) When did you see the
3 defendant for the first time?

4 A. Mr. Tello was seen for the first time last
5 year on April the 20th. I think it was the initial
6 day
7 for his evaluation.

8 Q. And was that there at your office in
9 Dallas?

10 A. Yes, it was.

11 Q. And did you make an evaluation of the
12 defendant on that date?

13 A. I made a preliminary evaluation on the
14 defendant during that day and recommended
15 that he begin
16 attending sex offender treatment.

17 Q. Did the defendant attend sex offender
18 treatment?

19 A. He started, I believe, the following week,
20 like the 29th, and attended group treatment for
21 approximately one month.

22 Q. And what does your sex offender treatment
23 program consist of?

24 A. It consists of we meet one time a week for an
25 hour and a half per time. And in the program itself,
the number one thing that we want the
offenders to do

is accept full responsibility for their offense.
Along

with that --

1 Q. I'm sorry to interrupt you. Why is that
2 important?

3 A. It's important because if a sex offender
4 doesn't accept full responsibility for their
offense,

5 they are more at risk for committing another
sexual
6 offense. So we want to make sure that,
beginning out,
7 that they totally accept responsibility for the
offense
8 that they're on probation for.

9 Q. Now, how are you satisfied that the defendant
10 accepts responsibility for an offense if he's on
11 community supervision?

12 A. There are a number of ways. The primary way
13 is when I initially meet with them and when they go
14 into the group program. We talk about their offenses
15 and whether or not they feel like they are guilty of
16 their offense. And from there, if a person accepts
17 full responsibility, then we process it, help them
18 understand the steps that led to the offense.

19 If they do not accept full
20 responsibility, we try to help break through
their
21 denial. And at times this also includes possibly
even
22 taking a polygraph examination. They're
referred.

[p.56 line 23 to p.57 line 12 address additional
features of the program, e.g., awareness of offense
cycle, relapse prevention, communication skills,
anger management, and the guidelines.]

Al Merchant - Direct by Mr. Conradt

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13 Q. Did this defendant, John Tello, ever
accept
14 responsibility for the offenses that he was on
15 probation for?

16 A. For one offense, the victim that was not
his

17 biological son, he accepted, I think,
responsibility
18 for that one. For his son, he did not.
19 Q. And how do you address that problem?
20 A. How we address it is that both myself
and
21 other group members, we work with them on
trying to -
22 basically we go over the offense report itself
and what
23 the victim states happened and see if through
working
24 with them, they can come up with a way to
break through
25 the denial.

Al Merchant - Direct by Mr. Conradt

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1 - And then from there, if appropriate, we
2 have to refer them outside for what's called an
instant
3 offense polygraph.

4 Q. Did the defendant attend treatment - group
5 treatment sessions with you?

6 A. Yes, he did.

7 Q. How many did he attend? Do you know?

8 A. I think he attended approximately four. I can
9 look it up and give you an exact amount if I need to.
10 I think it was approximately four.

11 Q. How long is your program?

12 A. The program itself, the majority of offenders
13 are in my program, a ballpark figure, a minimum of
two

14 to three years. It takes a long time to turn around
15 deviant behavior that many of them had a lifetime.

16 Q. Did the defendant successfully complete
your
17 program?

18 A. No, he did not.
19 Q. How come?
20 A. Mr. Tello did not make satisfactory progress
21 during the time he was in the program itself. Mr.
22 Tello was very resistant to the treatment program
and
23 input from myself, from other group members. He
was
24 often argumentative, hostile, and just basically was
25 not amenable to sex offender treatment.

Al Merchant - Cross by Mr. Blessing 59

1 Q. When was he discharged from your
program? Do
2 you know?
3 A. I think the approximate date was May
27th.

[lines 4-21 are the admission of State's Ex. No. 1—
MERCHANT's discharge summary.]

22 MR. CONRADT: Pass the witness.

23 CROSS-EXAMINATION

24 BY MR. BLESSING:

[In p.59 line 25 to p.61 line 17, MERCHANT clearly
states his opinion that Lyles Arnold is "a qualified
sex offender treatment provider," then not so clearly
that he understands Dr. Franklin Lewis to be "one of
the more lenient providers." Blessing works through
non-responsive answers.]

Al Merchant - Cross by Mr. Blessing 61

18 Q. (By Mr. Blessing) All right. Now, you stated
19 earlier that the defendant would not accept
20 responsibility for his conduct for which he was on
21 probation for; is that correct?

22 A. Correct.

23 Q. And you testified to Mr. Conradt that he
did

- 24 accept responsibility for two of the three
offenses,
25 bu* not for the third; is that correct?

Al Merchant - Cross by Mr. Blessing

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- 1 A. For one of the three. I think we didn't -
2 Mr. Conradt didn't address the child
pornography issue
3 with me.

- 4 Q. Do you want to address that now? I
mean, did
5 he admit responsibility for the child
pornography?

- 6 A. No.

- 7 Q. And so did he accept responsibility for
the
8 other child, Nicholas?

- 9 A. If that's the other victim, yes.

- 10 Q. But not his own?

- 11 A. Correct.

- 12 Q. And so it's your testimony then at that
13 particular time when they don't accept
responsibility

- 14 that you have them take polygraphs?

- 15 A. That's one of the options, yes.

- 16 Q. And that was done here, was it not?

- 17 A. I'm sorry?

- 18 Q. That was done here, was it not?

- 19 A. I'm not sure what "here" means.

- 20 Q. That was done in this instance?

- 21 A. In my program?

- 22 Q. With Mr. Tello.

- 23 A. Mr. Tello didn't last until we got to that
24 point.

- 25 Q. All right. I want to show you a polygraph

1 that was requested or a copy of a polygraph
2 report that
3 was requested by the probation department
4 marked as
5 Defendant's 1. Have you ever seen that
6 polygraph
7 result?

8 A. I do not believe so.

9 Q. You don't recall ever seeing that result?

10 A. Not from Mr. Sheppard.

11 Q. Okay.

12 MR. BLESSING: Your Honor, at this time
13 we would offer Defendant's 1 at this particular
14 time as
15 an exhibit.

16 MR. CONRADT: State would object to the
17 introduction of Defendant's Exhibit No. 1, Your
18 Honor.

19 There's no predicate laid from this particular
20 defendant - I mean, from this particular
21 witness, plus

22 I think his testimony is he was - the defendant
23 was

24 discharged from his group on May the 27th, and
25 this

26 report, Defendant's Exhibit 1, is dated July 9th
27 of

28 2004.

29 MR. BLESSING: We'll withdraw the
30 request, and we'll recall Ms. Niles to offer that
31 exhibit at a later time.

32 Q. (By Mr. Blessing) Did you ever have a
33 conversation with Mr. Tello that he had passed
34 a
35 polygraph prior to entering into your
treatment program

1 in which it showed that he was truthful with
regards to

2 his conduct with his son?

3 A. I had had a conversation with him.

4 Q. Did you ever see a copy of that
polygraph?

5 A. I believe so. I would have to check and
see.

6 Q. I'll show you what's been marked as

7 Defendant's Exhibit No. 2 and ask you, can you
identify

8 that?

9 A. This may have been one of the
polygraphs that

10 Mr. Tello showed me.

11 Q. So that is one of the polygraphs that
you've

12 seen; is that correct?

13 A. Yes.

14 MR. BLESSING: Your Honor, we'd offer
15 Defendant' No. 2.

16 MR. CONRADT: May I take a moment, Your
17 Honor?

18 May I take this witness on voir dire?

19 THE COURT: You may.

20 VOIR DIRE EXAMINATION

21 BY MR. CONRADT:

22 Q. Mr. Merchant, in regard to Defendant's
Exhibit

23 No. 2, it purports to be a polygraph exam. Did
you

24 request this particular examination?

25 A. No, I did not.

1 MR. CONRADT: I'll pass the witness, and
2 the State would object to the introduction of
3 Defendant's Exhibit No. 2. There's no proper
predicate
4 laid in that no personal knowledge from this
defendant,
5 and I don't think business record -- business record --
6 State's not waiving its 14 days' notice.

7 THE COURT: Objection sustained.

8 CROSS-EXAMINATION (CONT.)

9 BY MR. BLESSING:

10 Q. All right. Mr. Merchant, when one of your
11 patients or counseling participants is not truthful
12 with you with regards to accepting responsibility, one
13 of the things you've testified to that they do is that
14 they take polygraphs; is that correct?

15 A. That's one of the procedures.

16 Q. Now, if they are truthful on those polygraphs
17 that address that particular issue, how do you handle
18 that type of situation?

19 A. If it's someone -- if it's a polygrapher that
20 I've referred them to and if the results are truthful,
21 then we deal with it based on a case-by-case basis.

22 Q. And how would you deal with it on this
23 particular case-by-case basis?

24 A. We never reached that point. I mean, that's
25 hypothetical.

1 Q. If you did reach that point. If he did take a
2 polygraph. Hypothetically if he did take a polygraph
3 and he was truthful about his responsibility with
4 regard to his own son and he was truthful in that,
how
5 would you deal with Mr. Tello?

6 A. We would still deal with him as -- in terms as

7 being a sex offender to address the other offenses.

8 Q. Okay. So if that were the case,
9 hypothetically speaking, and one of the reasons for
Mr.

10 Tello being discharged from your program was that
he

11 didn't accept responsibility and passed a subsequent
12 polygraph, then that would take that out of the
factor,

13 would it not?

14 A. The not accepting responsibility for his
15 offense, that was only one of the reasons why he was
16 discharged.

17 Q. What was another reason?

18 A. Mr. Tello was discharged because he basically
19 refused to cooperate with the treatment program.

20 Q. Can you be more specific?

21 A. Sure. He was belligerent, argumentative,
22 hostile, refused to receive feedback, secretly
23 violating our rules of treatment.

24 Q. Can you give me specific acts that he did?

25 A. Sure. He -- Mr. Tello wore a suit coat to

Al Merchant - Cross by Mr. Blessing

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1 every group and --

2 Q. Wore a suit coat?

3 A. And he secretly recorded all our sessions.

4 Q. And did you know that at the time of his
5 discharge?

6 A. I suspected it.

7 Q. So it was a pure speculation; is that correct?

8 A. Well, it's based on some documentation that I
9 received that indicated that Mr. Tello had been
taping

10 the sessions.

[In, p.67 line 11 to p.68 line 14, MERCHANT gives
nonspecific examples of Tello's non-responsiveness to

MERCHANT's version of treatment.]

Al Merchant - Cross by Mr. Blessing

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- 15 Q. Isn't it true, Mr. Merchant, that you
learned
16 that Mr. Tello had filed a complaint with the
State
17 Board of Social Worker Examiners? Did you
receive a
18 copy of that?
19 A. Yes, I did.
20 Q. And when did you receive that?
21 A. Probably the last week of May.
22 Q. And when did you - did you receive that
23 before you discharged Mr. -
24 A. Yes.
25 Q. - Tello -

Al Merchant - Cross by Mr. Blessing

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- 1 A. Yes.
2 Q. -- from your group?
3 A. Yes.
4 Q. How many days before?
5 A. Probably within the week.
6 Q. Okay. And on the day that you discharged
him,
7 did you take his money?
8 A. Yes.
9 Q. Because every time y'all have a meeting, you
10 pay -- you pay up first, isn't that right, before the
11 meeting starts?
12 A. That's correct.
13 Q. You took his money, and then -- as you
did
14 everyone else, and then you addressed Mr.
Tello with

15 regards to his complaint that he had filed in
front of

16 *the group; is that right?*

17 A. That's correct.

18 Q. And -- and when he wouldn't discuss it with
19 you because he felt like it was not appropriate, then
20 you discharged him; is that correct?

21 A. That's not correct.

22 Q. Well, tell me what is correct.

23 A. What we did is -- let me address the money
24 part.

25 Q. No, tell me what is correct.

Al Merchant - Cross by Mr. Blessing

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1 A. I will definitely do that. I took his money
2 because we spent the first majority of the group
3 dealing with Mr. Tello. So he was actually involved in
4 that group session.

5 And then Mr. Tello -- we brought up
6 issues. At the beginning of each group, there are
7 issues that we talk about. And so if there is an
8 issue, whether it's with the group, me, whatever,
9 that's discussed the whole time that they're in
10 treatment. And Mr. Tello never indicated there was a
11 problem as far as his treatment in our groups.

12 And so then it came up in the last
13 meeting that Mr. Tello had filed a complaint during
the
14 group itself.

15 Q. So you took his money, you addressed
him, and
16 you told him to get out of your class; is that
right?

17 A. No, we -- he paid for the session because
we
18 spent time dealing with him that session. We
processed

19 what took place, and then a decision was made
to

20 terminate Mr. Tello.

21 Q. Well, in fact, you left the group, and you told
22 Mr. Tello to discuss this particular issue with the
23 group without you being there; isn't that true?

24 A. I do not remember that, no.

25 Q. You don't --

Al Merchant - Redirect by Mr. Conradt

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1 A. No.

2 Q. Do you take any notes about these group
3 sessions?

4 A. Yes, I do.

5 Q. Did you bring any notes with you today?

6 A. If I stepped out of the group, it was to go
7 get something and come back in. I did not tell Mr.
8 Tello to discuss this outside of my absence.

9 Q. So you don't have any independent recollection
10 of what happened on the day that you discharged
him?

11 A. What I'm telling you is that I did not step
12 outside the group and tell the group to discuss this in
13 my absence. If I left the group, it was to go right
14 next door to get a file or something like that. I did
15 not tell them to discuss it in my absence.

16 MR. BLESSING: No further questions.

17 REDIRECT EXAMINATION

18 BY MR. CONRADT:

19 Q. Did the defendant's complaint with the
State

20 Board of Social Work Examiners influence you
to

21 discharge him from the group treatment?

22 A. That was not the primary reason.

23 Q. What was the primary reason?

24 A. At some point I thought we were making
 some
25 progress. There had been some initial hurdles
 in

Al Merchant - Recross by Mr. Blessing

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1 group, and I thought things were settling down.
 Then
2 ultimately I found out that things were not
 settling
3 down. It was a factor. Like I said earlier, there
4 were some concerns that confidentiality was
 being
5 violated by Mr. Tello. And those things -- there's
 a
6 group rule sheet that states confidentiality
 must be
7 respected amongst all group members. And
 that's a
8 factor in his discharge.

9 MR. CONRADT: Pass the witness, Your
10 Honor.

11 RECROSS - EXAMINATION

12 BY MR. BLESSING:

13 Q. And how was that confidentiality being
14 breached?

15 A. If someone is secretly taping the sessions,
16 then the confidentiality of each group member in that
17 setting is being breached. It's crucial for any type
18 of therapy or any type of group process for there to be
19 a level of trust among group members and among
20 individuals. And so if someone is violating,
21 especially without someone's permission, then
 that
22 violates their trust; that violates the program. ¹

¹ But violating Tello's Physician-Patient privilege, TEX. R. EVID.

23 Q. So the discharge – his discharge from
 your
24 group was based partially on the fact that he
 had filed
25 a complaint with the board; is that correct?

Al Merchant - Recross by Mr. Blessing

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1 A. That was a factor, but that wasn't the
 only
2 thing, correct.
3 Q. But it was definitely a factor in
 discharging
4 him; was it not?
5 A Yes.

MARY ANN GILBERT, CSR, RMR, RDR
382nd Judicial District Court

509, is not a problem for MERCHANT. See also TEX. OCC. CODE ANN. §§ 109.051 and 109.052 ("treatment information" *shall* be released to law enforcement).

[Note: The transcript pages are out of sequence so that all of the NILES-JONES testimony be read together. She was first called by STATE and then by the defense.]

Steve Thomas - Cross by Mr. Blessing 18

14 THE COURT: He's excused.
15 Next witness.
16 MR. CONRADT: Your Honor, the State would
17 call Carol Niles-Jones.
18 And, Judge, I don't think Ms. Jones was
19 sworn.
20 THE COURT: Okay.
21 (Witness duly sworn by the Court)
22 THE COURT: Have a seat.
23 MR. CONRADT: May I proceed?
24 THE COURT: Yes, sir.
25 CAROL NILES-JONES,

Carol Niles-Jones - Direct by Mr. Conradt 19

1 having been duly sworn, testified as follows:
2 DIRECT EXAMINATION
3 BY MR. CONRADT:
4 Q. Would you state your name to the Court,
5 please, ma'am?
6 A. Carol Scobee Niles-Jones.
7 Q. Ms. Jones, are you employed?
8 A. Yes, I am.
9 Q. By whom?
10 A. Rockwall County Adult Probation.
11 Q. What do you do for Rockwall County Adult
12 Probation?
13 A. I'm an adult probation officer.
14 Q. What's your educational background to hold
15 that position?
16 A. I have a bachelor's degree in criminal justice
17 and a master's degree in counseling.
18 Q. How long have you worked for the probation

19 department here in Rockwall County?

20 A. Since 1992.

21 Q. Do you hold any state licenses?

22 A. Yes, I do.

23 Q. From where?

24 A. From the State of Texas.

25 Q. And what agencies?

Carol Niles-Jones - Direct by Mr. Conradt 20

1 A. I'm a certified probation officer. I also
2 hold licenses in Texas for a chemical dependency
3 counselor, marriage and family therapist, and
4 licensed
5 professional counselor.

6 Q. And you were employed as a community
7 supervision officer, probation officer, back in March
8 of 2004?

9 A. Yes, I was.

10 Q. Do you recall whether or not you had an
11 occasion in March of 2004 to see a person introduced
12 to you as John Thomas Tello?

13 A. Yes.

14 Q. Do you see that person here in the courtroom
15 today?

16 A. Yes, I do.

17 Q. Do you recall when you saw him, first time?

18 A. The first time was for the pre-sentence
19 investigation. That was conducted -- if I could refer
20 to my notes -- on March the 8th of '04.

21 Q. Now, were you in court on March the 18th of
22 2004 when this defendant was placed on probation?

23 A. No, I was not.

24 Q. I believe awhile ago you pointed out a
25 particular individual here in the courtroom as John
Thomas Tello.

1 A. Yes.

2 MR. CONRADT: Your Honor, could you let
3 the record reflect that the witness has identified the
4 defendant in open court?

5 THE COURT: So reflected.

6 Q. (By Mr. Conradt) After you did the
7 pre-sentence investigative report, when was the next
8 time you saw the defendant?

9 A. I saw him on March the 26th of '04.

10 Q. And what purpose did you have in seeing the
11 defendant on March the 26th of 2004?

12 A. I was assigned to his case, and that was our
13 first office visit.

14 Q. What all did you do and talk to about the
15 defendant on that date? What all went on then?

16 A. We talked about his sex offender registration
17 at the Mesquite Police Department. We talked
about his

18 sex offender evaluation and treatment, and I
made him a

19 referral. We went over all the conditions. We
20 discussed the modum in his computer. We
discussed

21 where he resided and that it looked over a swimming
22 pool where children gather.

23 I referred him to the sheriff's office
24 for a DNA submission, and then we set another office
25 visit.

1 Q. I think you mentioned that you went over the
2 terms and conditions of community supervision with
the

3 defendant. Did he have any questions concerning
those

4 terms and conditions?

5 A. No, he did not.
6 Q. Did he express any concerns about whether or
7 not he would be able to abide by those terms and
8 conditions of community supervision?
9 A. No, he did not.
10 Q. Did you make a referral of the defendant
11 to
12 some individual for sex offender treatment?
13 A. Yes.
14 Q. And what person did you make the
15 referral?
16 A. That was Al Merchant.
17 Q. And where is Mr. Merchant?
18 A. He's located in Dallas.
19 Q. Why did you refer him to Mr. Merchant?
20 A. He's one of the registered sex offender
21 treatment providers that we have utilized in
22 the past.
23 Q. Did the defendant express any concerns on
24 March the 26th of 2004 about going to see Al
25 Merchant?
A. No.
Q. Did you see the defendant after March the
26th?
A. Yes, I did.

Carol Niles-Jones - Direct by Mr. Conradt 23

1 Q. And when was the next date?
2 A. I saw him again on March the 30th of '04.
3 Q. And what purpose did you have in seeing the
4 defendant on March the 30th?
5 A. It was a regular office visit conducted at my
6 department.
7 Q. Did you and the defendant discuss the
8 referral
9 to Mr. Merchant at that time?
A. Yes. I questioned -- I had learned that the

10 defendant was going to file a motion with the court to
11 try to have him stay with the therapist he was
12 currently being seen. And Mr. Tello, although he did
13 not bring that up on March the 30th, I did question
him

14 about his willingness to switch programs, if he was
15 resistant to --

16 Q. I'm sorry to interrupt. Do you know who the
17 defendant was seeing before you referred him to Mr.
18 Merchant?

19 A. Yes, Dr. Franklin Lewis.

20 Q. And did you make that referral to Dr.
Lewis?

21 A. No.

22 Q. This was somebody that the defendant
was
23 already seeing?

24 A. Yes.

25 Q. Why did you want him to go to Mr.
Merchant's

Carol Niles-Jones - Direct by Mr. Conradt 24

1 program?

2 A. I wanted him to go to another therapist,
not

3 in particular Mr. Merchant, but to another
therapist

4 because I believe the court should make the
referral

5 rather than the defendant seeking his own. So I
chose

6 a registered sex offender treatment provider
that I

-7 knew and the department had worked with
previously.

8 Q. Your concern was he was setting the terms of
9 community supervision by seeing doctor --

10 MR. BLESSING: Object to leading.

11 THE COURT: Sustained.

12 Q. (By Mr. Conradt) Why did you want the
13 defendant to see someone other than Dr. Lewis?

14 A. I had concerns that the defendant - he
had

15 told me he'd been seen individually for a year
with Dr.

16 Lewis, and I had some concerns about the
17 appropriateness of that type of therapy with a
sex

18 offender.

19 Q. To your knowledge, did the defendant go to
Mr.

20 Merchant's program?

21 A. Yes, he did.

22 Q. Was he evaluated, to your knowledge, by Mr.
23 Merchant?

24 A. Yes, he was.

25 Q. To your knowledge, was there ever any court

Carol Niles-Jones - Direct by Mr. Conradt 25

1 order changing your referral from Mr. Merchant to
Dr.

2 Lewis?

3 A. No.

Carol Niles-Jones - Direct by Mr. Conradt 26

15 Q. I believe after the May 5th, 2004, meeting
16 with the defendant, did you see him again?

17 A. Yes.

18 Q. And when was that?

19 A. The next time I saw him was the next day for
20 an unscheduled office visit on May the 6th of '04.

21 Q. Did you speak to the defendant on that date?

22 A. Yes, I did.

23 Q. And what did he tell you then?

24 A. That Al Merchant had asked him to leave the
25 group ² that same day. Apparently the defendant was

Carol Niles-Jones - Direct by Mr. Conradt 27

1 discussing his Internet porn research for the
2 Republican Party of Texas and how a Coppell teacher
was
3 wrongly accused of child molestation and research
has
4 been done showing that children lie about sexual
abuse
5 accusations, especially when their parents are going
6 through a divorce.

7 Q. Well, what did that have to do with his terms
8 and conditions of probation?

9 A. Nothing.

10 Q. Okay. I was curious.

11 To your knowledge, did the defendant
12 successfully complete Mr. Merchant's treatment
program?

13 A. No, he did not.

14 Q. And how do you know that?

15 A. He was unsuccessfully discharged.

16 Q. Do you know when that discharge took place?

17 A. Yes, on May the 27th of 104.

18 Q. What did you do to try to get the
defendant in

19 treatment after that discharge of May 26th -
I'm

20 sorry, May 27th of 2004?

21 A. Well, at first I wanted to get a discharge
22 summary from Mr. Merchant outlining just
exactly what

² The 29 April 2004 meeting with Merchant was an *individual* session. This 6 May meeting was Tello's first *group* session.

23 the reasons for termination were. Then once I
received
24 those and in reviewing his case, I wanted him –
it was
25 time for him to have some polygraph exams. I
wanted

Carol Niles-Jones - Direct by Mr. Conradt 28

1 him to have those. I had some concerns, wanted
to make
2 sure he was compliant with all of his conditions
before
3 we went further to another referral.

4 So I had him – I referred him to the
5 polygraph examiner first before I made another
6 referral.

7 Q. To your knowledge, did the defendant
8 successfully complete the polygraph exams?

9 A. Yes, he did.

10 Q. Now, how do defendants communicate with
you at

11 the office? Do they come by, call you, leave messages?

12 A. All of the above, yes, sir.

13 Q. All of that?

14 A. All of that.

15 Q. On June the 1st of 2004, did you have any
16 communication with the defendant on that
date?

17 A. Yes. The defendant called me – actually,
it

18 was – he left a voice mail on May the 26th of '04,
and

19 I got it on June 1st. And the message stated
that he

20 and a co-worker were dropping off air filters at
21 Lighthouse Daycare.

22 Q. What is Lighthouse Daycare?

23 A. It's a daycare facility.
24 Q. What type?
25 A. For children.

Carol Niles-Jones - Direct by Mr. Conradt 29

1 Q. How old are the children there, if you know?

2 A. I don't know, but I would assume little
3 children.

4 Q. Now, did you see the defendant in an office
5 visit on June the 2nd of 2004?

6 A. Yes.

7 Q. On that date, did the defendant tell you
8 anything about going to the Lighthouse Daycare?

9 A. Yes, he stated that on May the 26th, he went
10 onto the property of the Lighthouse Daycare on
Horizon

11 Road.

12 Q. Did you see the defendant on June the 30th of
13 2004?

14 A. Yes.

15 Q. Office visit, telephone, what?

16 A. Office visit.

17 Q. Office visit? Did the defendant admit to
you

18 on June the 30th of 2004 that he had been on
the

19 premises at Ridge Pointe Athletic Club?

20 A. Yes.

21 Q. What did he tell you?

22 A. He stated at first that he was just on the
23 roof installing the filters. But when I
confronted him

24 about other information that I had, he did state
that

25 he was inside the facility.

1 Q. Now, have you ever been in Ridge Pointe
2 Athletic?

3 A. Yes.

4 Q. Is there a daycare center there?

5 A. Yes.

6 Q. For small children?

7 A. Yes.

8 Q. Being on the premises of the Lighthouse
9 Daycare and at Ridge Pointe Athletic Club,
would you be
10 concerned that those – if the defendant was
present at
11 those premises, would that violate, in your
opinion,

12 the safety zones created by this Court?

13 MR. BLESSING: Your Honor, I want to
14 object. That invades the province of the Court.

15 THE COURT: Overruled.³

16 THE WITNESS: Yes, I was concerned.

17 Q. (By Mr. Conradt) Why?

18 A. Well, not going into a daycare or where
19 children congregate is one of the most important
20 conditions for a sex offender. And I had grave
21 concerns that if he so casually violated those, I
had

22 concerns about other conditions that he may
have

23 violated. I had concerns about having contact,
direct

24 contact, with children.

25 Q. After the discharge from Mr. Merchant's
group

³ Thus, NILES-JONES, the probation officer, gives expert testimony in the area of psychological medicine and now also law. This hearing was on 17 Feb 2005, *a year and a half after* Art. 42.12 § 13B(i) was first effective, namely 1 Sep 2003.

1 therapy, was the defendant ever placed in any
2 other

3 type of sex offender treatment program?

4 A. No.

5 Q. Why not?

6 A. That was my decision. As I said, I wanted
7 to

8 gather more information. I knew that Mr. Tello
9 was

10 suing his therapist. ⁴

11 Q. How did you know that?

12 A. He had told me.

13 Q. The therapist or the defendant?

14 A. Both.

15 Q. Okay.

16 A. And I had concerns about finding a therapist
17 for Mr. Tello considering that he had a lawsuit going,
18 also that he was in violation of the conditions. And I
19 wanted to know – I wanted to be reassured that
20 he had

21 not violated any other conditions, that he was
22 abiding

23 by the conditions, all the other ones. So I
24 wanted

25 polygraph exams before I made any further
26 referrals.

27 MR. CONRADT: Pass the witness, Your
28 Honor.

29 CROSS-EXAMINATION

30 BY MR. BLESSING:

31 Q. Did you make those polygraph –

32 A. Yes, I did.

⁴ Ethical complaints (two different Boards), Yes. Criminal
complaints (state and federal), Yes. Civil litigation, not yet.

1 Q. A second time?

2 A. He had, I believe, a total of two.⁵

3 Q. And was he truthful on both of those
4 polygraphs?

5 A. Yes, he was.

6 Q. And those polygraphs were performed by Andy
7 Shepherd; is that right?

8 A. That's correct.

9 Q. And so you had -- you had concerns on two
10 different occasions, once stated earlier at the time
11 that he was discharged in May and then again on this
12 June 30th date; is that correct?

13 A. That's correct.

14 Q. And after each concern, you requested
15 polygraphs to address those issues. And then
those

16 polygraphs were, according to the licensed
polygraph

17 operator, that Mr. Tello was truthful during
those

18 polygraphs.

19 A. He was truthful to the admissions that he
20 made.

21 Q. He was truthful on the polygraph.

22 A. Yes, to the admissions.

23 Q. And you talked to the polygraph operator
24 before the polygraphs were administered, did
you not?

25 A. Yes.

1 Q. And you told him of your concerns and
what you

⁵ Plus the one the year prior.

2 wanted addressed at the polygraph, did you
not?

3 A. Correct.

4 Q. Now, after those concerns were that he was
5 truthful, did he go for a period of time from the time
6 that he was discharged in May until he was referred
to

7 another sex counselor?

8 A. I'm sorry --

9 Q. Did you ever make a referral to another
sex
10 counselor?

11 A. No.

12 Q. And you felt that it was in his best
interests

13 and I guess the public in general that he not
continue

14 with a sex counselor?

15 A. No, I didn't think that. The district
16 attorney was filing a motion to revoke.

17 Q. When was it filed?

18 A. I requested it on July the 12th. Let's see
19 what the file date was.

20 Q. I believe it was July 15th.

21 A. Yeah, July 15th.

22 Q. So from the end of May through --
through the

23 middle of July, no referral or subsequent
referral was

24 ever made.

25 A. That's correct.

Carol Niles-Jones - Cross by Mr. Blessing 34

1 Q. During that period of time, did you ever
have

2 a conversation with Mr. Tello that perhaps
another sex

3 counselor could be assigned to him or another
4 referral

5 could be made?

6 A. I told him that I would be making
7 another

8 referral, yes.

9 Q. And can you look at your chronological notes
10 that are computer generated in the front of your file
11 for June the 4th of 2004?

12 A. Yes.

13 Q. And what does that say?

14 A. The telephone conversation that I had?

15 MR. BLESSING: May I approach the
16 witness, Judge?

17 THE COURT: You may.

18 Q. (By Mr. Blessing) No, the last portion
19 where

20 it's highlighted where it's in a highlight --
21 someone's

22 highlighted it there where it says, "I am
23 concerned."

24 A. Oh, okay. "I advised defendant I am
25 concerned

he is trying to control his treatment instead of
the

21 Court controlling his treatment."

22 Q. And what else does it say?

23 A. Following that?

24 Q. Yes.

25 A. "I advised the defendant it is my

Carol Niles-Jones - Cross by Mr. Blessing 35

1 recommendation that the Court allow the
2 defendant to

3 continue with another treatment provider
4 approved by

3 the probation department. It is my intent that
4 the
5 defendant learn how to succeed on this type of
6 probation. I advised I will call his attorney."
7 Q. Okay.
8 A. Should I continue?
9 Q. No, that's fine.
10 Again, there's a highlighted portion
11 there that's been highlighted by someone in
12 your
13 office, I suppose. Can you read that for us?
14 A. "The defendant reported it was
15 recommended by
16 his attorney that he not have a lapse in his
17 treatment,
18 and he referred him to Lyles Arnold. He has an
19 appointment with him on Monday. I advised
20 the
21 defendant the Court has not approved this and
22 the
23 referral is not coming from the Court or
24 probation
25 office."
26 Q. And so it was your concern that he not
27 have a
28 lapse in his counseling, and it was also evident
29 from
30 Mr. Tello that I was concerned about a lapse in
31 his
32 counseling. Is that a true statement or accurate
33 statement?
34 A. I was not concerned about the period of
35 time
36 he was not in counseling.

1 Q. You weren't concerned about that.

2 A. I referred him for polygraphs, and I
wanted to

3 get those done.

4 Q. Okay. And he had polygraphs.

5 A. And I was concerned about – certainly
about

6 his getting back into therapy, but I wanted to
gather

7 more information before I did that.

8 Q. And you expressed to Mr. Tello and you
and I

9 had a conversation that it was not Mr. Tello's
right or

10 authority to go just to any counselor that he
wanted

11 to. And you advised him of that, and you and I
had a

12 discussion about that; is that correct?

13 A. That's correct.

14 Q. So he was taken out of counseling at your
15 request?

16 A. Yes.

17 Q. And never even went to a subsequent
counselor?

18 A. That is correct.

19 Q. Do you know whether or not there were any
20 children at Lake Pointe at the time that Mr. Tello
was

21 there at Lake Pointe Athletic Center on June the
28th,

22 2004?

23 A. That's Ridge Pointe Athletic Club. And, no, I
24 was not aware if there were any children. I knew the
25 daycare facility was operating, was functional at that

Carol Niles-Jones - Redirect by Mr. Conradt 37

1 time.

2 Q. Listen to my question. Do you have personal
3 knowledge that at the time that Mr. Tello was at
4 Ridge
5 Pointe Athletic Center at 811 Yellow Jacket Lane in
6 Rockwall, Texas, on June the 28th of 2004 whether or
7 not there were any children present at that time?

8 A. No, I have no knowledge.

9 Q. Would you have more concern had Mr. Tello
10 not
11 -- had been at these locations and not said anything?

12 A. Perhaps.

13 MR. BLESSING: Just one moment, Judge,
14 please.

15 That's all I have.

16 **REDIRECT EXAMINATION**

17 BY MR. CONRADT:

18 Q. Ms. Niles-Jones, I believe the defendant's
19 attorney asked you about the June 4th, 2004, chrono
20 notes you have, and you expressed some concerns
21 about

22 whether or not the defendant could successfully
23 complete treatment; is that correct?

24 A. That's correct.

25 Q. Why did you have those concerns?

26 A. If I could review my notes. I knew that Mr.
27 Tello was disappointed that he wasn't able to
28 continue
29 with Dr. Lewis, and I was concerned that he would be

Carol Niles-Jones - Redirect by Mr. Conradt 38

1 unwilling or unable to submit to another treatment
2 program that he -- that was not of his choosing, that
3 was of the Court's choosing.

4 Q. Did the Court ever allow the defendant during
5 the terms of community supervision to attend Dr.

6 Lewis's treatment program?

7 A. No.

8 Q. Dr. Lewis was never on the approved sex
9 offender treatment list for this defendant; is that
10 right?

11 A. That's correct.

12 Q. Now, why is it important for a defendant
to go

13 to sex offender treatment of the Court's
choosing or

14 the Community Supervision Office's choosing
as opposed
15 to his own?

16 A. Certainly if the defendant has
understandings

17 about another therapist that he may find more
likeable

18 than one that the Court may choose. You know,
I could

19 understand someone wanting to have a
therapist of their

20 own choosing; however, a sex offender on
probation

21 cannot be allowed to make that decision. That
must be

22 made by the Court and the officer of the court
so that

23 the probation office can maintain control of the
24 defendant's therapy, that that therapy leads the

Carol Niles-Jones - Recross by Mr. Blessing 39

1 therapy and take responsibility for his actions.

2 Q. Was the defendant in this case doing
that,

3 taking responsibility for what happened?

4 A. No, he was not.

5 MR. CONRADT: Pass the witness.

6 RECROSS - EXAMINATION

7 BY MR. BLESSING:

8 Q. What do you base that on?

9 A. I'm sorry?

10 Q. What do you base that on?

11 A. Base what on?

12 Q. In your opinion that he wasn't taking
13 responsibility.

14 A. In Mr. Merchant's program, he seemed to
be

15 more interested in espousing his views than he
was

16 working his own program.

17 Q. Than working whose program?

18 A. His program, his therapy program.

19 Q. Mr. Merchant's program?

20 A. No, Mr. Tello's.

21 Q. And so polygraphs were given to address
that

22 issue of whether or not he was taking
responsibility?

23 A. No, polygraphs were given because I had
24 concerns about violations of conditions of
probation.

25 Q. Is Lyles Arnold on yall's approved list?

Carol Niles-Jones - Recross by Mr. Blessing 40

1 A. Yes, he is.

2 Q. Have you had a probationer that was required
3 to go to these sex therapy treatment programs with
Al

4 Merchant and they didn't; they were released from
that

5 program and entered into another program? Have
you

6 ever had that situation occur?

7 A. No.

8 Q. You've never had one discharged from one and
9 enter another one?

10 A. Yes. I thought you said that went from Al
11 Merchant to Lyles Arnold.

12 Q. You said no to that.

13 A. Yeah, I don't have any knowledge of that.

14 Q. But you do have knowledge that they have
gone

15 out of one into another?

16 A. Oh, certainly, yes.

17 Q. That happens quite often, does it not?

18 A. It does happen.

19 Q. In fact, you talked to Mr. Tello that if you
20 can't succeed in Merchant's, then we'll go to
plan B

21 and -

22 A. Exactly, yes.

23 Q. - get you someone else. And Lyles Arnold
is

24 one of those therapists who is on your
approved list.

25 Not Dr. Lewis, not the one he'd been seeing for
over a

Carol Niles-Jones - Recross by Mr. Blessing 41

1 year, but Dr. Lyles Arnold who had never seen
him.

2 A. Yes.

3 Q. And he got into that program on his own
after

4 he was discharged. And you told him not to go;
is that

5 right?

6 A. I did not make that referral to Lyles
Arnold.

7 Q. You told him that you were adamant
about the

8 fact that you did not want him to go to Lyles
9 Arnold on
10 his own?
11 A. I was not making that referral, yes.
12 Q. You told him to get out of it. You had a
13 conversation with me after you talked with him
14 and
15 told him you did not want John Tello selecting
16 his
17 own therapist.
18 A. That's correct.
19 Q. And to get out of Lyles Arnold's class.
20 A. I didn't know that he'd gone, but, yes.
21 MR. BLESSING: No further questions.
22 MR. CONRADT: State has no other
23 questions of this witness, Your Honor. May she be
24 finally excused?
25 THE COURT: Any objection?
MR. BLESSING: None.
THE COURT: You're excused.
Who is your next witness going to be?

Sherry Epp - Direct by Mr. Conradt

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1 MR. CONRADT: Sherry Epp.
2 MR. BLESSING: Your Honor, the last
3 witness is still in the courtroom. I'd like to still
4 have the rule invoked. I don't know if we're going to
5 call her back or not, but we'd still like the --
6 THE COURT: She was finally excused,
7 correct?
8 MR. CONRADT: I thought so. It's my
9 fault she's in here.
10 MR. BLESSING: I'm sorry then. I haven't
11 excused her. I may want to recall her.
12 THE COURT: Ms. Jones, if you'll wait
13 outside.
14 MR. CONRADT: And I apologize to the

15 Court. I thought she was finally excused.

16 May I proceed?

17 THE COURT: Yes, sir.

18 SHERRY EPP.

Carol Niles-Jones - Direct by Mr. Blessing 76

16 MR. CONRADT: Judge, State rests in each
17 of those three cases.

18 MR. BLESSING: We call Ms. Jones.

19 THE COURT: All right.

20 CAROL SCOBEE NILES-JONES,

21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BLESSING:

24 Q. Please state your name.

25 A. Carol Scobee Niles-Jones.

Carol Niles-Jones - Direct by Mr. Blessing 77

1 Q. Ms. Jones, you testified earlier in this
2 hearing against Mr. Tello in these three cases; is that
3 correct?

4 A. Yes.

5 Q. And part of your testimony earlier, you
6 discussed the fact that on two occasions, because of
7 some concerns with Mr. Tello's progress in his sex
8 therapy class, that you had a polygraph administered
to

9 Mr. Tello; is that correct? —

10 A. That's correct.

11 Q. And was that done by Andy Sheppard?

12 A. Yes, it was.

13 Q. I want to show you what's been marked as
14 Defendant's Exhibit No. 1 and ask you to look at that
15 exhibit. And can you identify it?

16 A. Yes, I can.

17 Q. And is that a copy of Mr. Sheppard's — the
18 results of his polygraph that he had given Mr. Tello?

19 A. Yes, this is the instant offense polygraph.
20 Q. Okay. And what's the date of that polygraph?
21 A. It was taken on 7/9/04.
22 Q. Okay. And --
23 MR. BLESSING: May I approach the witness
24 again, Your Honor?
25 THE COURT: You may.

Carol Niles-Jones - Direct by Mr. Blessing 78

1 Q. (By Mr. Blessing) Have you -- have you seen
2 this -- this exhibit before?
3 A. Yes.
4 Q. Okay. And did you have a copy of this exhibit
5 before you filed the motion to revoke?
6 A. Yes.
7 MR. BLESSING: We'd offer again
8 Defendant's Exhibit No. 1.
9 MR. CONRADT: No objections, Your Honor.
10 THE COURT: It's admitted.
11 MR. BLESSING: May I approach the witness
12 just to stand?
13 THE COURT: You may.
14 Q. (By Mr. Blessing) And this particular
15 polygraph, the main crux of the polygraph was to
16 address the issues with the offense against his son, is
17 that correct, or one of the issues?
18 A. Yes, uh-huh. Yes.
19 Q. Accepting responsibility for the conduct with
20 his son; is that right?
21 A. That's correct.
22 Q. And he asked three questions of him, and they
23 all were questions that related to the conduct alleged
24 with regards to his son; is that right?
25 A. That's correct.

- 1 Q. And they being, "Before probation, in the last
2 three years, have you washed Nicolas' genitals with
3 your bare hand?" And he said no.
4 A. That's correct.
5 Q. Correct?
6 A. Uh-huh.
7 Q. And the second question was, "Before
8 probation, in the last three years, did you place your
9 bare hand on Nicolas' genitals while bathing him?"
10 And the answer was no; is that correct?
11 A. That's correct.
12 Q. And the third question was, "Before probation,
13 did you ever do any sexual act with Nicolas?" And the
14 answer is no; is that correct?
15 A. That's correct.
16 Q. And were the answers to these questions
17 truthful or not?
18 A. They were truthful.
19 MR. BLESSING: No further questions.
20 CROSS-EXAMINATION
21 BY MR. CONRADT:
22 Q. On Defendant's Exhibit 1 -- do you have a copy
23 of that in front of you?
24 A. Yes, I do.
25 Q. Second page, very last word on that page,

- 1 what's that word?
2 A. Second page.
3 Q. Second page, very last -- the start of the
4 sentence on that last page -- on the second page.
5 A. Okay. The sentence, "Tello said" --
6 Q. Yeah. What does that say? "Tello said."
7 A. "Tello said nobody can keep him from seeing
8 his son."
9 Q. I'm sorry. The last -- second page.

- 10 A. Uh-huh.
11 Q. And the very last word on that page is what?
12 A. I'm sorry. "Tello said."
13 Q. Okay. Now, Tello said what?
14 A. "If Carol messes with me, there's going to be
15 a blood bath."⁶

⁶ Even with the following clarification, this is not the best of ways to express the idea. To clarify, what's missing in this statement, which statement is from the polygrapher's notes of this immediately-post-polygraph-exam conversation, is the term "legal." The exact quote is this, "If Carol messes with me, there's going to be a LEGAL blood bath." How intentionally Sheppard left out that rather critical term from his report is unknown.

Some additional context is this. NILES-JONES has *no authority* to compel this exam in the first place, but she holds the threat and harassment of revocation for non-compliance. Thus, Tello's liberty hangs in the balance. Being falsely accused of molesting his son is an extremely stressful circumstance. Being told by the people with the power over his liberty that he's a liar on this point, in the face of the existing polygraph exam that produced the exact same results, does not diminish the *incredible* stress and anxiety caused by being compelled even to think about responding to such false charges. Tello had already "voluntarily" terminated his parental rights. He'd been "unsuccessfully dismissed" by MERCHANT, an obvious set-up by/with NILES-JONES. These clinical/medical questions are *outrageously* personal and emotionally "violating." This transcript contains only three of them. And NILES-JONES has *absolutely no authority or business* asking those questions. (Tello is considerably better versed on Fifth Amendment doctrine as a result of this *unconscionable* experience.) This particular matter is also laced with the reality that his own son has (been) turned against him. And, only moments before these remarks, he had just completed, *very successfully*, this *second* polygraph exam regarding *false* charges of molesting his own son. So, even at a time of candor and stress release from an extraordinarily over-stressed circumstance, the remark overstates the sentiment of *legal* action against NILES-JONES for not accepting facts as facts. But, Tello expressed himself regarding *LEGAL* action, nothing more.

The following is at the very end of Defendant's Ex. No. 1:

POST-TEST

... Tello said, "If Carol messes with me, there's gonna be a bloodbath." I advised Tello he should refrain from speaking like that. I told him, "Watch what you say," on two occasions. I also told him I believed his attorney would advise him not to be saying

- 16 Q. What do you think about that?
17 A. I was extremely disturbed.
18 Q. Did you do anything about it?
19 A. Yes, sir, I did something immediately.
20 Q. What did you do?
21 A. I ran to the district attorney's office.
22 Q. Why?
23 A. I was afraid for my welfare and the welfare
24 for every employee at the probation department.
25 Q. Because of the defendant?

Carol Niles-Jones - Redirect by Mr. Blessing 81

- 1 A. Yes, sir.
2 MR. CONRADT: Pass the witness.
3 REDIRECT EXAMINATION
4 BY MR. BLESSING:
5 Q. So even though he's truthful with regard to
6 the conduct of his son, you would rather have him in
7 jail or in the penitentiary as opposed to getting some
8 type of treatment, is that correct, because it's become
9 a personal issue, has it not, a personal battle between
10 you and Mr. Tello, has it not?
11 A. No, sir, it has not.
12 Q. But you'd rather him be in the penitentiary.
13 Is that your recommendation to this Court?
14 A. It is the recommendation; however, I am
15 interested in Mr. Tello getting some therapy.

such things aloud. Tello said he had an "army of lawyers," to which I replied, "So does the probation department." I dismissed Tello from the office.

NILES-JONES certainly "called Tello's hand." She sure "showed him." The revocation proceeding is so flagrantly retaliatory that it screams from the page. Tello was at one day-care in May, was "unsuccessfully dismissal" in May, and was at the athletic club in June. But, on 9 July he passes this illegal and unauthorized polygraph exam, makes his remark, and in less than a week, as of 15 July, without legal cause or evidence, Tello was in jail. As stated at the top, all Tello needed was a law-biding probation officer; hence the removal.

16 Q. But you'd rather it be in the penitentiary; is
17 that right?

18 A. I believe that that would be the appropriate
19 punishment in this case.

20 Q. Even though in other instances you have -- you
21 have given sex offenders subsequent sex therapy
22 providers in the past?

23 A. That is correct, yes.

24 MR. BLESSING: No further questions.
[The remainder is closing and argument.]

MARY ANN GILBERT, CSR, RMR, RDR
382nd Judicial District Court

COPY

1

REPORTER'S RECORD

VOLUME 3 OF 4 VOLUMES

TRIAL COURT CAUSE NO. 2-03-279

TRIAL COURT CAUSE NO. 2-03-280

TRIAL COURT CAUSE NO. 2-03-451

STATE OF TEXAS) IN THE DISTRICT
) COURT

) COURT

VERSUS) ROCKWALL COUNTY,
) TEXAS

) TEXAS

JOHN THOMAS) 382ND JUDICIAL
TELLO) DISTRICT

TELLO) DISTRICT

ADJUDICATION AND SENTENCING BY THE COURT

SENTENCING BY THE COURT

• • •

On the 1st day of March, 2005, the above-entitled and numbered cause came on for hearing before the Honorable Brett Hall, Judge presiding of the 382nd Judicial District Court of Rockwall County, Texas, at which time the following proceedings were had.

entitled and numbered cause came on for hearing

before the Honorable Brett Hall, Judge presiding of

the 382nd Judicial District Court of Rockwall County.

Texas, at which time the following proceedings were

had.

Appearances

2

APPEARANCES:

MR. RAY SUMROW

CRIMINAL DISTRICT ATTORNEY

State Bar No. 19511375

BY: MR. LOUIS W. CONRADT

Assistant District Attorney

7 State Bar No. 04709700
 -and-
 8 MS. ANGELA CONVERSE
 Assistant District Attorney
 State Bar No. 24025220
 9 Rockwall County Government Center
 1101 Ridge Road, Suite 105
 10 Rockwall, Texas 75087
 Phone (972) 882-0201
 11 Fax (972) 882-0212

FOR THE STATE OF TEXAS

12
13

14 MR. D. BRIAN BLESSING
 Attorney at Law
 State Bar No. 02486500
 15 P.O. Box 1254
 Rockwall, Texas 75087
 16 Phone (972) 771-9954
 Fax (972) 722-3097

17

FOR THE DEFENDANT

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PROCEEDINGS

THE COURT: We're back on the record in Cause No.s 2-03-451, 2-03-279, and 2-03-280, all styled

The State of Texas versus John Thomas Tello.

The motion to revoke hearing had concluded. Both sides had made argument. So first thing from the evidence presented, I find that the allegation in the State's Motion to Adjudicate are substantiated by the evidence and that they are true in

all three cases.

Therefore, Mr. Tello, I find you guilty of the offense as charged in each of the three cause numbers. And from the testimony at the hearing, it's evident to me that probation in this case was not successful nearly from the beginning, either with the therapist or with the probation officer. And there was

no evidence actually presented at the hearing to show the Court why it would be any different in the future or that it might be successfully in the future.

So, therefore, Mr. Tello, in each of these three cases, the Court sentences you to seven years in the Texas Department of Corrections, the Institutional Division. In accordance with the law, they will run concurrently, and you will receive credit as required by law for the time you have spent.

Good luck to you, sir.

(End of Volume 3. Volume 4 contains the Exhibits Volume)

2005 March 1—Judgment

DEFENDANT'S COPY

**FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
MAR 0 1 2005**

**AM PM
7|8|9|10|11|12|1|2|3|4|5|6**

CAUSE NO. 2-03-279

**THE STATE OF TEXAS * 382ND JUDICIAL
 * DISTRICT
VS. * COURT IN AND FOR
 * ROCKWALL COUNTY,
JOHN THOMAS TELLO * TEXAS**

JUDGMENT ADJUDICATING GUILT

JUDGE PRESIDING: Brett Hall

DATE OF JUDGMENT: 03/01/05

ATTORNEY FOR

STATE: Bill Conradt/Angela Converse

ATTORNEY FOR

DEFENDANT: Brian Blessing

**OFFENSE CONVICTED OF: INDECENCY WITH A
CHILD - EXPOSURE**

DATE OFFENSE COMMITTED: March 30, 2003

**DEGREE: 3RD VIOLATION OF: 21.11 TEXAS PENAL
CODE**

**DATE OF COMMUNITY SUPERVISION ORDER:
March 18, 2004**

**PARAGRAPH(S) VIOLATED AND GROUNDS FOR
REVOCATION: Paragraph(s) number(s) 21 of community**

supervision set out in the Court's Original Order.

DEFENDANTS PLEA TO ALLEGATIONS:

NOT TRUE on February 17, 2005

COURTS' FINDINGS: TRUE on March 1, 2005

original punishment assessed:)

**FIVE (5) YEARS DEFERRED ADJUDICATION
COMMUNITY SUPERVISION**

DATE OF SENTENCE ADJUDICATING GUILT:

March 1, 2005

**SENTENCE: SEVEN (7) YEARS TEXAS DEPARTMENT
OF CRIMINAL JUSTICE/INSTITUTIONAL DIVISION;**

\$50.00 COURT COSTS

TIME CREDITED: 237 Days

CONCURRENT UNLESS OTHERWISE SPECIFIED.

[12] ON THIS DAY set forth above, the defendant, **JOHN THOMAS TELLO**, appeared in open court with his/her attorney, and the community supervision officer and the Criminal District Attorney for Rockwall County, Texas. After examining the report of said community supervision officer and hearing testimony, the Motion to proceed with adjudication of guilt filed herein, it is therefore, **ORDERED, ADJUDGED AND DECREED** by the Court that the Order deferring adjudication of guilt and placing defendant on community supervision heretofore entered in this cause be, and the same is hereby set aside and of no further force and effect.

THEREAFTER, the defendant was arraigned on the offense shown above; and entered a plea as shown above,⁸ as well as a plea to each enhancement paragraph, if any, as shown above; or, if shown above, the attorney for the

⁷ As such in original.

⁸ "NOT TRUE." Cf. Petition, p.19 n.26.

State waived one or more such paragraphs.

IT IS THEREFORE CONSIDERED AND ORDERED by the court, in the presence of defendant, that said Judgment be, and the same is hereby, in all things approved and confirmed; and that said defendant is adjudged guilty of the offense set forth above, and which offense was committed on the date shown above, and that if findings of true are shown above as to enhancement paragraphs, the said defendant is also adjudged to be a repeat or habitual felony offender, as charged, and that the said defendant be punished in accordance with terms set forth above; and that the defendant having been asked by the court if the defendant had anything to say in law why sentence should not be pronounced against the defendant, and answered nothing in bar thereof, the said defendant is hereby sentenced to a term of **SEVEN (7) YEARS** imprisonment in the Texas Department of Criminal Justice/Institutional Division, or other facility legally authorized to receive such convict for the particular punishment assessed herein.

FURTHER, AS TO RESTITUTION, if it be shown above by an amount of dollars and cents that the defendant should pay one or more persons restitution or reparation for the commission of the above-named offense, the court FURTHER FINDS, after considering all of the evidence in this case that said amount of restitution or reparation or both, as shown above is due and owing by the defendant.

IT IS FURTHER ORDERED that the Judgment is entered as of the date of judgement⁹ shown above; the sentence is to commence as of the date shown above; and credit is given for time defendant has already served, if any, as shown above, for the above offense.

FURTHER, AS TO PUNISHMENT, if it be shown as

⁹ As such in original.

cumulation above [13] that the defendant has been duly and legally convicted of a prior offense by showing the place and court, cause number and offense, together with the punishment for such offense and date defendant was sentenced for such offense in accordance with such conviction, then it is also ORDERED AND ADJUDGED that the punishment herein adjudged against said defendant shall begin when the judgment in such prior offense as shown above shall have ceased to operate.

IT IS THEREFORE FURTHER ORDERED that the defendant shall be confined for the above-named term, if such a term of confinement be shown above, in accordance with the provisions of law governing such punishment; and execution may issue, as necessary, and the defendant is remanded to jail until the Sheriff of Rockwall county can obey the direction of this judgment.

SIGNED THIS 1 day of March, 2005.

/s/ Brett Hall

JUDGE PRESIDING
382ND DISTRICT COURT
ROCKWALL COUNTY, TEXAS

[fingerprint] *Right Thumbprint*
Taken by Holland (634)

2005 March 8—"Right to Appeal" Certificate

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
MAR - 8 2005
AM /s/ initials ? PM
7|8|9|10|11|12|1|2|3|4|5|6

Cause No. 2-03-279

THE STATE OF TEXAS § IN THE DISTRICT
 § COURT
VS. § 382ND JUDICIAL
 § DISTRICT
John Thomas Tello § ROCKWALL COUNTY,
 § TEXAS

TRIAL COURT'S CERTIFICATION OF
DEFENDANT'S RIGHT OF APPEAL *

I, judge of the trial court, certify this criminal case:

- ☒ is not a plea-bargain case, and the defendant has the right of appeal, [or]
- ☐ is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial, and not withdrawn or waived, and the defendant has the right of appeal, [or]
- ☐ is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal, [or]
- ☐ is a plea-bargain case, and the defendant has NO right of appeal, [or]
- ☐ the defendant has waived the right of appeal.

/s/ Brett Hall
Judge

3-8-05
Date Signed

I have received a copy of this certification:

Defendant (if not represented
by counsel)
Mailing Address:

Defendant's Counsel
State Bar No.:
Mailing Address:

Telephone #:

Fax # (if any)

Telephone #:

Fax # (if any):

* A defendant in a criminal case has the right of appeal under these rules. The trial court shall enter a — certification of the defendant's right to appeal in every case in which it enters a judgment of guilt or other appealable order. In a plea bargain case ---- that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant ---- a defendant may appeal only: (A) those matters that were raised by written motion filed and ruled on before trial, or (B) after getting the trial court's permission to appeal. TEXAS RULE OF APPELLATE PROCEDURE 25.2 (a)(2).

2005 May 2—Direct Appeal Fee, Note

[For security purposes, and to avoid circulation of competing originals, this is watermarked.]

988.40

988.40

Tello's Territorial Promissory Note

Reference: Statement, 25 April A.D. 2005

382nd District Court

ROCKWALL COUNTY, TX

Cause Nos. 2-03-279, 2-03-280, 2-03-451

STATE OF TEXAS v. TELLO

Issue Date: 2 May 2005

Place of Issuance: ROCKWALL, TX, territorial to "this state."

N.B. As of the date of issuance, in "this state," per 31 U.S.C. §§ 5101, 5102 and 5103, there is no definition of a "dollar," thus no competent evidence of a unit of account.

In full and complete discharge of this obligation, I, JOHN TELLO, acting territorially to TX and to "this state," generally, hereby tender this unconditional promise to pay the sum certain of nine hundred eighty-eight and 40/100 "dollars" to bearer or order.

This promise in full and complete discharge is tendered without prejudice to any of my commercial rights territorial to "this state," UNITED STATES OF AMERICA and UNITED NATIONS.

P.O. Box 870983
MESQUITE, TX 75187

John Tello

988.40

Territorial Promissory Note (TELLO)

988.40

**2005 May 5—Direct Appeal Fee, District Clerk's
Letter**

**[Circular SEAL of THE STATE OF TEXAS
ROCKWALL COUNTY]**

**Rockwall County
Government Center
1101 Ridge Road, Suite 209
Rockwall, Texas 75087**

**KAY McDANIEL May 5, 2005 (972) 882-0260
DISTRICT CLERK FAX (972) 882-0268**

**Mr. John Tello
P. O. Box 870983
Mesquite, TX. 75187**

**Re: Cause No. 2-03-279; 2-03-280; 2-03-451
The State of Texas vs. John Thomas Tello**

Dear Mr. Tello:

**Please send a cashier check or money order in the amount
of \$988.40 for the preparation of the Clerk's Record in the
above causes. We are unable to accept a Territorial
Promissory Note. When received, the above record will be
sent to the Fifth District Court of Appeals at Dallas,
Texas.**

Sincerely,

**/s/ Kay McDaniel
Kay McDaniel
District Clerk**

**Cc: Fifth Court of Appeal
382nd Judicial District Court**

**2005 May 23—Mandamus (Direct Appeal Fee), State
Appellate Court, Memorandum Opinion**

**Writ of Mandamus Denied;
Opinion issued May 23, 2005**

[Circular SEAL of THE STATE OF TEXAS]

**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-05-00669-CV

IN RE JOHN TELLO Relator

**Original Proceeding from the
382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-03-279, 2-03-280, 2-03-451**

MEMORANDUM OPINION

**Before Justices Morris, Richter, and Mazzant
Opinion By Justice Richter**

Relator contends the district clerk abused his discretion in not accepting relator's promissory note in payment for the preparation of the clerk's records for relator's appeals. We conclude relator's petition is clearly groundless and frivolous. Accordingly, the Court **DENIES** relator's petition for writ of mandamus. Should relator file another pleading like this one, the Court will consider imposing sanctions against relator. See TEX. RS. APP. P. 52.8(a) and 11.

/s/ Martin Richter
**MARTIN RICHTER
JUSTICE**

050669F.P05

**2005 May 23—Mandamus (Direct Appeal Fee), State
Appellate Court, Order**

**Writ of Mandamus Denied;
Order issued May 23, 2005**

[Circular SEAL of THE STATE OF TEXAS]

**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-05-00669-CV

IN RE JOHN TELLO Relator

**Original Proceeding from the
382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-03-279, 2-03-280, 2-03-451**

ORDER

Before Justices Morris, Richter, and Mazzant

In accordance with the Court's opinion issued this date, the petition for writ of mandamus is **DENIED**. It is **ORDERED** that relator bear all costs of this original proceeding. It is **ORDERED** that relator pay the Court's filing fee for an original proceeding of \$75 by cashier's or certified check, or money order within ten days of the date of this letter. Should relator fail to comply, the Court may issue a show cause order why relator should not be held in contempt for disobeying the Court's order.

/s/ Martin Richter
MARTIN RICHTER
JUSTICE

**2005 May 26—Mandamus (Direct Appeal Fee), State
Supreme Court, Clerk's First Letter**

[Circular SEAL of THE STATE OF TEXAS]

THE SUPREME COURT OF TEXAS

Post Office Box 12248

Austin, Texas 78711

(512) 463-1312

Thursday, May 26, 2005

Mr. John Tello
PO Box 870983
Mesquite TX 75187

RE: Case Number: 05-0409
Court of Appeals Number: 05-05-00669-CV
Trial Court Number: 2-03-279, 2-03-380, 2-03-451

Style: IN RE JOHN TELLO

Dear Mr. Tello:

Today the Supreme Court of Texas filed your petition for writ of mandamus. The filing fee for this document is **\$75.00** and should have been paid at the time of filing. The Court has been notified of this delinquency and if the fee is not paid within ten (10) days from the date of this letter, the filing will be dismissed. See TEX. R. APP. P. 5.

Please remit the fee as soon as possible. If paying by check or money order, please record the above referenced docket number on the instrument. The payment should be made payable to "Clerk, Supreme Court of Texas." If you have already sent your payment, please disregard this notice. If you are unable to pay the fee, then you may submit an appropriate pauper's affidavit.

Sincerely,

C-66

/s/ Andrew Weber
Andrew Weber, Clerk
by Jessica L. Carden, Deputy Clerk

**2005 June 2—Mandamus (Direct Appeal Fee), State
Supreme Court, Cover Letter (for Note)**

2 June A.D. 2005

John Tello
P.O. Box 870983
Mesquite, Texas 75187

Mr. Andrew Weber, Clerk
The Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: No. 05-0409, In re Tello

Dear Mr. Weber:

Thank you for your always-prompt attention in such matters.

For filing, please find enclosed my First Amended Petition for Writ of Mandamus.

I'm comfortable that this Court have no more authority to take the ultimate benefit from "this state," namely "tax exempt" status, *and* be in a position to compel the form of the promise in discharge, than any other court throughout "this state."

Thus, for the fee, please find enclosed my Foreign Promissory Note in the amount of 75 "dollars."

Try always to remember who has compelled, and continues to compel, the discussion of this issue.

Sincerely,

/s/ John Tello

John Tello

Encls.

cc: Abbott
Sumrow
Gonzales
Roper
Clerk, 382^d

Status Report notices to
Clerk, US Fifth Circuit
Clerk, Northern District of Texas
Clerk, Fifth District at Dallas

**2005 June 14—Direct Appeal (Fee and Record),
State Appellate Court, Chief Justice's Order**

Order issued June 14 , 2005

[Circular SEAL of THE STATE OF TEXAS]

**In The
Court of Appeals
Fifth District of Texas at Dallas**

**No. 05-05-00368-CR
No. 05-05-00369-CR
No. 05-05-00370-CR**

JOHN THOMAS TELLO Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-03-279, 2-03-280 & 2-03-451**

ORDER

Because no clerk's record has been filed within the time allowed, the trial court is **ORDERED** to make findings of fact regarding whether appellant has been deprived of the clerk's record because of ineffective counsel, indigence, or for any other reason.

The trial court shall first determine whether appellant desires to prosecute the appeal. If the trial court determines that appellant does not desire to prosecute this appeal, it shall make a finding to that effect.

If the trial court determines that appellant desires to prosecute the appeal, it shall next determine whether appellant is indigent and entitled to proceed without payment of costs for the clerk's record. If appellant is entitled to proceed without payment of costs, the trial court shall make [12] a finding to that effect. Moreover, if appellant is indigent, the trial court is **ORDERED** to take such measures as may be necessary to assure effective representation, which may include appointment of new counsel. If the trial court finds appellant is not indigent, it shall determine whether retained counsel has abandoned the appeal.

The trial court shall next determine: (1) whether appellant requested preparation of the clerk's record; (2) the date such request was made; and (3) whether appellant, if not indigent, paid or made arrangements to pay for preparation of the clerk's record. See TEX. R. APP. P. 35.3, 37.3.

The trial court shall next determine: (1) the trial court clerk's explanation for the delay in filing the clerk's record; and (2) the earliest date by which the clerk's record can be filed.

We **ORDER** the trial court to transmit a supplemental clerk's record, containing the written findings of fact, any supporting documentation, and any

orders to this Court within thirty (30) days of the date of this order.

The appeal is **ABATED** to allow the trial court to comply with this order. It shall be reinstated thirty (30) days from the date of this order or when the supplemental record is received, whichever is earlier.

/s/ Linda Thomas

LINDA THOMAS
CHIEF JUSTICE

**2005 June 24—Mandamus (Direct Appeal Fee), State
Supreme Court, Clerk's Second Letter**

[Circular SEAL of THE STATE OF TEXAS]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

Mr. John Tello
P0 Box 870983
Mesquite, TX 75187

Mr. Galen Ray Sumrow
Criminal District Attorney
1101 Ridge Road, Suite 105
Rockwall, TX 75087

Mr. Rafael Edward Cruz
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

RE: Case Number: 05-0409
Court of Appeals Number: 05-05-00669-CV
Trial Court Number: 2-03-279, 2-03-380, 2-03-451

Style: IN RE JOHN TELLO

Dear Counsel:

The Court previously informed you that your petition for writ of mandamus was received without a filing fee or pauper's affidavit. The deadline for receipt of the fee or affidavit has expired and has not been received. It is for this reason the Court has dismissed your petition for writ of mandamus as amended in the above-referenced case. See TEX. R. APP. P. 5.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk
by Claudia Jenks,
Chief Deputy Clerk

cc: Ms. Lisa Matz [Clerk, state appellate court]
Ms. Kay McDaniel [Clerk, state trial court]

**2005 July 8—Direct Appeal (Fee and Record), State
Appellate Court, Order**

Order issued July 8 , 2005

[Circular SEAL of THE STATE OF TEXAS]

**In The
Court of Appeals
Fifth District of Texas at Dallas**

**No. 05-05-00368-CR
No. 05-05-00369-CR
No. 05-05-00370-CR**

JOHN THOMAS TELLO Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-03-279, 2-03-280 & 2-03-451**

ORDER

The Court **REINSTATES** these appeals.

On June 14, 2005, we ordered the trial court to make findings regarding why the clerk's records have not been filed. We **ADOPT** the trial court's findings that: (1) appellant desires to prosecute the appeals; (2) appellant is not indigent; (3) appellant is representing himself in the appeals; (4) appellant has not been deprived of the reporter's record due to indigence or ineffective assistance of counsel; (5) appellant has not paid for the clerk's records; (6) appellant's attempt to pay for the records by his promissory note was rejected by the District Clerk, and his petition for writ of mandamus filed in this Court regarding that matter was denied; (7) the Texas Supreme Court dismissed appellant's petition for writ of mandamus on the same issue because he did not pay a filing fee; and (8) the clerk's records have been prepared and will be filed when appellant makes the payment for them.

We **ORDER** the Rockwall County District Clerk, within **FIFTEEN DAYS** of the date of this [12] order, to file either the clerk's records or written verification that appellant has not paid for the clerk's records. If we receive verification that payment has not been made, we will, without further notice, dismiss the appeals for want of prosecution. See TEX. R. APP. P. 37.3.

We **DIRECT** the Clerk to send a copy of this order, by first class mail, to John Thomas Tello, Post Office Box 870983, Mesquite, Texas 75187.

/s/ A Mazzant

AMOS L. MAZZANT
JUSTICE

**2005 July 26—Direct Appeal Fee, District Clerk's
Letter**

[Circular SEAL of COUNTY OF ROCKWALL
STATE OF TEXAS]

**Kay McDaniel, District Clerk
1101 Ridge Road, Ste. 209
Rockwall, Texas 75087
972-882-0260**

July 26, 2005

Court of Appeals
Fifth District of Texas at Dallas
George Allen Sr. Courts Bldg.
600 Commerce St., 2nd Floor
Dallas, Texas 75202

Re: John Thomas Tello v. State of Texas; Appeal Court
Nos. 05-05-00368-CR, 05-0500369-CR, and 05-05-00370-
CR Trial Court Nos. 2-03-279, 2-03-280, 2-03-451

Dear Appeals Court,

In accordance with your Order dated July 8, 2005, we are
notifying you that as of July 26, 2005 we have not
received payment for the Clerk's Records.

Sincerely,

/s/ Sue Hill
Chief Deputy Clerk

Cc: John Thomas Tello
P.O. Box 870983
Mesquite, Texas 75187

**2005 August 29—Direct Appeal, State Appellate
Court, Notice (STATE's Brief, allowed late)**

[Note: As of mid-September, this is the most recent communication from the state appellate court. There is one postcard for each case.]

[Circular SEAL of THE STATE OF TEXAS]

Fifth Court of Appeals
600 Commerce Street, Suite 200
Dallas, Texas 75202

August 29, 2005

RE: Case No. 05-05-00368-CR

Style: Tello, John Thomas
v. The State of Texas

The Court today GRANTED the State's motion for extension of time to file the brief in the above referenced cause. The brief heretofore received is duly filed as of this date.

T. C. Case # 2-03-279

Lisa Matz, Clerk

JOHN THOMAS TELLO
P O BOX 870983
MESQUITE TX 75187

*[Note: From the Table of Contents of STATE's Brief—
Argument and Authority [Note: Sole argument featured]*

**I. APPELLANT'S CHALLENGE TO THE TRIAL
COURT'S DECISION TO ADJUDICATE GUILT
IS PRECLUDED BY ARTICLE 42.12 § 5(b);
APPELLANT'S APPEAL SHOULD BE
DISMISSED FOR LACK OF JURISDICTION]**

*[Note: Tello didn't appeal the decision to adjudicate, but
rather the illegal judgment and sentence. See Art.
42.12 § 23. STATE briefly responded to all 12 Points.]*

[Note: Sole signatory—GALEN RAY SUMROW.]

Affidavit regarding Christian Farmer

[Note: Tello and Jacqueline Farmer submitted the two Affidavits for Tello's "Verified Emergency Motion for Bond Reduction And Emergency Motion for Stay And Emergency Ex Parte Motion for Protective Order" in Nos. 05-05-368-CR, -369-CR and -370-CR in the state appellate court. This is her Affidavit. An identical verified statement was also filed with a motion for protective order in the Bond removal matter: 3:05-CV-1049-N.]

State of Texas §
County of Dallas § ss. KNOW ALL MEN BY THESE
PRESENTS

Before me, the undersigned Notary, acting territorial to Texas, personally appeared Jacqueline Farmer, who satisfied me as to her identity, and who, upon administration of oath or affirmation by me, declared and deposed as follows:

I am Jacqueline Farmer. I am at least 21 years of age. Actually, I'm more than 65. I am competent to make this Affidavit. I have personal knowledge of these facts, and these facts are true and correct.

I have worked for John Tello for many years now. He had no other place to go when he was released, and I offered him a room until life settled and he could move back into his house or find another place.

Christian Farmer is my son. The director, Theodore Wood, of the summer camp, Camp Paluxy, a landmark in Erath County, molested my son when he was about 10 years old. A few years ago, he told John, and he's resented John for John's telling me. Christian has blamed me from age 10 to this very day for sending him there. When I did find out, I confronted that camp director, by phone, and his response was, "That happened over 20 years ago." The camp director is now 80-

something. What happened to Christian happened to many others, as Christian can confirm, and as embarrassing as all of this is, where this circulates, more people may come forward, and my son may eventually forgive me for not preventing something I had no idea even existed as a problem to prevent.

He may also learn that John is not his problem, either. I did not raise Christian to destroy other people's property. ¹⁰

I called the police that night because someone was prowling around the front of the house. John told me that he had seen very bright flashes, which we've concluded were caused by the camera's flash feature. Christian told the police that night, in my presence, that the DA had encouraged him to get photographic proof as to where John was residing. John was exactly where he said he'd be.

Further, Affiant sayeth not.

¹⁰ From the **Emergency** Ex Parte Motion for Protective Order: "The residence in which Tello is staying is Ms. Farmer's. Her grown (married with children) son, Christian Farmer, has stalked Tello since the day Tello was released. Both her Jeep and Tello's truck had nails and screws driven deeply into all tires except one (but including the spare stored *inside* the Jeep) Tello's first night of release. The truck's windshield is cracked from rocks being thrown at it. The motion detector on the front porch has been unplugged and turned up toward the roof for at least three nights running. The son, being *very obvious* about it, followed Tello on his rounds all day on Wednesday, 5 May, starting approximately 7:00 a.m., triggering at least two police reports against *himself*, and, that night, yet a third one even by his own mother. That night, Christian Farmer, after tampering with and deactivating the front porch motion detector (and its light) at his mother's house, went through the closed fence and snooped all around the house. He admitted to the police officer who responded to the call his mother made, at approximately 12:30 a.m., and in the presence of his mother, that he's acting under instructions and encouragement of the DA to get photographic proof of Tello in or around the residence so as to justify the bond revocation proceeding."

/s/ Jacqueline Farmer
Jacqueline Farmer, Affiant

Signed and sworn to before me on this the 13th of May,
A.D. 2005, for which note my seal and signature.

/s/
Notary Public Signature

(seal)

**Certificate of Service for Briefs—Direct Appeal,
Bond Appeal, State Appellate Court**

Certificate of Service

By my signature below, I certify that on this the 21st
day of July, A.D. 2005, I have caused to be dispatched to
the Clerk of the Court of Appeals, and have served on the
following, by certified mail, return receipt requested, a
true and correct copy of this Brief, with its Appendix:

Jo Nell Kinnard
Best Price Bail Bonds
101A Sherman
Richardson, Texas 75081

Clerk, 382^d Judicial District
Court
1101 Ridge Road, Room 209
ROCKWALL, TX 75087

RAY SUMROW
Rockwall County
Government Center
1101 Ridge Road
ROCKWALL, TX 75087

Hon. GREG ABBOTT
Office of Attorney General
STATE OF TEXAS
P.O. Box 12548
AUSTIN, TX 78711-2548

RICHARD B. ROPER
United States Attorney
Northern District of Texas
1100 Commerce, 3d Floor
DALLAS, TX 75242-1699

Hon. ALBERTO R.
GONZALES
Attorney General,
United States
10th & Pennsylvania Avenue,
N.W.
WASHINGTON, DC 20530

Complimentary copies are also delivered by regular mail to the following:

Dallas Bar Association (Amicus opportunity) 2101 Ross Avenue Dallas, Texas 75201	Tarrant County Bar Association Fort Worth Bar Association (Amicus opportunity) 1315 Calhoun Street Fort Worth, Texas 76102
---	--

San Antonio Bar Association (Amicus opportunity) Bexar County Courthouse 100 Dolorosa, 5 th Floor San Antonio Texas 78205	Houston Bar Association (Amicus opportunity) 1001 Fannin, Suite 1300 Houston, Texas 77002
--	--

State Bar of Texas, Appellate Section (Amicus opportunity) Bench Bar Liason ¹¹ Cynthia Timms, Chair Locke Liddell & Sapp LLP 2200 Ross Avenue, Suite 2200 Dallas, Texas 75201-6776	Fifth Circuit Bar Association (Amicus opportunity) Mary Gorman, Executive Director 600 Camp Street, Room 206 New Orleans, Louisiana 70130
---	---

/s/ John Tello
John Tello

¹¹ As such in original. Should be "Liason."
C-78

**Appendix D—Bond: Conditions, Removal,
Revocation, Appeal**

[Note: Appendices C, D, and E contain information available by judicial notice. These documents are part of the identified state court Records, but have not previously been made part of the federal trial or appellate Record in the immediate case. For the Bond matters, *see also* the Bond removal proceeding: 3:05-CV-1049-N.]

2005 April 29—The Bond and Conditions

[Note: The Bond amounts are as follows:

No. 2-03-279—\$15,000 (re: Brandon)

No. 2-03-280—\$65,000 (re: Nicolas (Tello's son))

No. 2-03-451—\$30,000 (re: the computer)]

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
APR 29 2005

AM PM
7|8|9|10|11|12|1|2|3|4|5|6

THE STATE OF TEXAS

KNOW ALL MEN BY THESE PRESENTS
COUNTY OF ROCKWALL

That we, John Tello, as principal, and being the Defendant in the charge referred to herein; and all other signers hereto as Sureties, are held and firmly bound unto the State of Texas in the penal sum of fifteen thousand, (\$ 15,000.00) Dollars, payable to said State, and for the payment of which sum, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally by these presents; and in addition thereto, we are bound for the payment of all necessary and reasonable expenses for the transportation and re-arrest of the principal and all travel

expenses incurred by any and all sheriffs or other peace officers to effect such re-arrest and transport of the principal in the event he fails to appear before the Court or Courts provided for herein at the time stated herein; the amount of such expense shall be in addition to the principal amount specified herein. For the payment of which sum or sums well and truly to be made, as aforesaid, we do bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents; this bond shall be valid and binding upon said principal and his sureties herein for the said principal's personal appearance before the Court designated herein and before any Court in which this cause may hereafter be pending ¹ at any time when, and place where, his presence may be required under the Code of Criminal Procedure of the State of Texas-or by any such Court, and for any and all subsequent Court proceedings had relative to the hereinafter described charge. This bond is further conditioned on the requirements set forth in exhibit A attached hereto.

Condition, that, whereas, heretofore the said principal was convicted of a felony offense in the 382nd District Court Rockwall County, Texas in Cause No. 2-03-279 and styled the State of Texas vs. John Tello and whereas on the 1st day of March AD., 2005 the said Court duly sentenced the said principal as part of said judgment of conviction, to which action of the Court the said principal in open Court excepted and filed a motion for new trial or gave notice of appeal to the Court of Appeals of the State of Texas, and who by order of the Judge of said Court, after due consideration, has been required to give bail pending appeal in the sum set out above conditioned for his personal appearance before said Court from day to day and from term to term of same, and not depart therefrom without leave of said Court, in order

¹ Given the automatic stay, removed matters are not *pending* in the state court, from the instant of removal until a remand, if any.

to abide the judgment of the Court of Appeals of the State of Texas and for any and all subsequent proceedings had relative to the charge as well as before any other Court to which said cause may be transferred, at any time when, and place where, his presence may be required under the Code of Criminal Procedure of the State of Texas, or by any of such Courts, and there remain from day to day and term to term of any of such Courts in which or before whomever said charge is pending, ² for any and all subsequent proceedings had relative to the charge, until discharged by due course of law; THEN the above bond will be null and void, OTHERWISE to be and remain in full force and effect.

WITNESS our hands this 28th day of April, A.D. 20 05. Taken and approved by me, this 29 day of April, A.D. 20 05.

Judge /s/ Brett Hall District Court 382nd

/s/ John Tello

Principal

9 Northcrest

Rockwall, Texas 75087

Mailing Address

/s/ Jo Nell Kinnard

Surety—*Executing Agent Financial Casualty & Surety, Inc.*

103 N. Goliad Ste 109

Rockwall, Texas 75087

(972) 227-3383

Mailing Address

Prisoner's Signature Witnessed

By Cpl Carrington #615, Jailer

² Given the automatic stay, removed matters are not *pending* in the state court, from the instant of removal until a remand, if any.

Cause No. 2-03-279

THE STATE OF TEXAS	* IN THE DISTRICT
	* COURT OF
VS.	* ROCKWALL COUNTY
	* TEXAS
JOHN TELLO	* 382 ND JUDICIAL
	* DISTRICT

EXHIBIT A

CONDITIONS OF BOND

This bond is further set on the following conditions:

Defendant Tello will be required to report to the Rockwall County Jail on the first and fifteenth of each month while on bond, and provide the Sheriff's Office with his current physical residence, ³ work address, ⁴ and telephone numbers.

Defendant Tello will remain within Rockwall County, or a contiguous county thereto, at all times unless specific written permission from the court provides otherwise.

Defendant Tello shall not make any contact with any of the victims of the offenses for which he is convicted, including Nicholas Tello, and Brandon Melton, or any of their family members and shall maintain a distance of at least 300 yards from their place of residence or employment. Further, Defendant shall not go to or be present at his former residence located at 9 Northcrest, Rockwall, Texas. ⁵

Defendant Tello shall not go in, on, or within 1000 feet of a premises where children commonly gather, including but not limited to a school, day care facility, playground,

³ The DA and state trial court specifically require a **residence address**, but *simultaneously* say Art. 42.12 § 13B(i) does **not** apply!

⁴ The DA and state trial court specifically require a **work address**, but *simultaneously* say Art. 42.12 § 13B(i) does **not** apply!

⁵ *But see* Divorce Decree regarding sale of house. [E-17] n.2.

public or private youth center, public swimming pool, or video arcade facility, or amusement park. ⁶

Defendant shall not go to the Rockwall County Supervision Office.

Defendant Tello shall turn over to the District Clerk of Rockwall County any passport currently issued to him and his birth certificate, or any copies thereof, prior to his release. Defendant further shall not make application for certified copy of a birth certificate or passport.

Defendant Tello shall commit no new offense of any kind.

Avoid injurious or vicious habits (including the use of illicit or habit-forming drugs and alcoholic beverages).

Defendant Tello shall prosecute his appeal and make all court appearances required upon being notified at his last known address.

Signed this the 29 day of April, 2005.

/s/ John Tello

⁶ How can the "zone" exist *without* its exceptions, i.e., Art. 42.12 § 13B(i), at any time, for any purpose or reason? Where the "zone" applies, are *residence* and *work* not implied or understood conditions of any form of "release?"

2005 May 6—STATE's Motion to Revoke Bond

**FILED FOR RECORD
ROCKWALL CO., TEXAS
2005 MAY -6 AM 11:52
KAY MCDANIEL
DISTRICT CLERK
BY _____ DEPUTY**

Cause No. 2-03-279

THE STATE OF TEXAS	* IN THE DISTRICT
	COURT OF
V.	* ROCKWALL COUNTY
	TEXAS
JOHN THOMAS TELLO	* 382ND JUDICIAL
	DISTRICT

STATE'S MOTION TO REVOKE APPEAL BOND

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, the State of Texas, by and through the Criminal District Attorney of Rockwall County, Texas, and would show the Court the following:

- 1. The Defendant, John Thomas Tello, was placed on deferred community supervision in the above entitled and numbered cause for the offense of indecency with a child on March 18, 2004, for a period of five (5) years.**
- 2. On July 15, 2004, the State of Texas filed a Motion To Revoke Unadjudicated Probation And Request For Final Adjudication and an Amended Motion To Revoke Unadjudicated Probation And Request For Final Adjudication on January 7, 2005.**
- 3. A hearing was held on the amended motion to adjudicate on February 17, 2005, with the Court finding the allegations contained in the Amended**

**Motion To Revoke Unadjudicated Probation And
Request For Final Adjudication to be "True" on
March 1, 2005.**

4. Defendant, John Thomas Tello, was sentenced to the Texas Department of Criminal Justice-Institutional Division for a period of seven (7) years and court costs on March 1, 2005.
5. An appeal bond was filed in this cause on April 29, 2005, which required the Defendant, John Thomas Tello, to not go in, on, or within 1000 feet of a premises where children commonly gather, including but not limited to a school, day care facility, playground, public or private youth center, public swimming pool, or video arcade facility, or amusement park.
6. On or about May 5, 2005, ⁷ Defendant, John Thomas Tello, violated one of the conditions of his appeal bond by going within 1000 feet of Next Generation Child Development Center, 4580 West Buckingham Road, Garland, Texas, a premise where children commonly gather.
7. On or about May 5, 2005, Defendant, John Thomas Tello, violated one of the conditions of his appeal bond by going within 1000 feet of the daycare facility [12] operated by Shiloh Terrace Baptist Church, 9810 La Prada, Dallas, Texas, a premises where children commonly gather.

Wherefore, the State of Texas requests that this Court set this motion for hearing, that the Clerk of this Court notify the Defendant, John Thomas Tello, of the hearing date and that upon hearing of this motion, that the appeal bond be revoked for violations of the conditions of such bond by the Defendant.

⁷ See, *supra*, [C-76] n.10.

Respectfully submitted,

Galen Ray Sumrow
Criminal District Attorney
1101 Ridge Road, Suite 105
Rockwall, Texas 75087
972.882.0201
972.882.0212 (Facsimile)

by: /s/ Louis W. Conradt, Jr.
Louis W. Conradt, Jr.
Assistant Criminal District Attorney
SBN 04709700

ORDER SETTING HEARING

The State's Motion To Revoke Appeal Bond is set for hearing on the 19 20 day of May, 2005, at 1:00 o'clock P. M. in the courtroom of the 382 Judicial District Court of Rockwall County, Texas, 1101 Ridge Road, Rockwall, Texas 75087.

The Clerk of this Court is hereby ordered to send notice of this hearing to the Defendant, John Thomas Tello, at his last known address and to his bondsman, Financial Casualty and Surety, Inc., 103 North Goliad, Suite 109, Rockwall, Texas 75087 requiring the Defendant, John Thomas Tello, to appear and answer the allegations contained in the State's Motion To Revoke Appeal Bond.

The Clerk of this Court is also ordered to send to Defendant, John Thomas Tello, a copy of the State's Motion To Revoke Appeal Bond filed in this cause.

Signed this 6 day of May, 2005.

Original Signed By
BRETT HALL
Judge, 382nd District Court

**Brett Hall, District Judge
382nd Judicial District Court
Rockwall County, Texas**

**2005 May 20—Federal, Notice of Removal Filed,
Bond Revocation proceeding**

**U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 20 2005
CLERK, U.S. DISTRICT COURT
By _____
Deputy**

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

STATE OF TEXAS,	§
a federal corporation	§
Plaintiff,	§
v.	§ Case No. <u>3 0 5 CV 1042-M</u>
JOHN THOMAS TELLO,	§
Bonded Releasee,	§ [became 3:05-CV-1049-B]
Defendant.	§ [became 3:05-CV-1049-N]

NOTICE OF REMOVAL

**FILED FOR RECORD
ROCKWALL CO., TEXAS
2005 MAY 20 PM 2:38
KAY MCDANIEL
DISTRICT CLERK
BY _____ DEPUTY**

[Note: All bold emphasis in transcripts is added.]

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State Bar No. 04709700

-and-

MS. ANGELA CONVERSE

Assistant District Attorney

State Bar No. 24025220

Rockwall County Government Center

1101 Ridge Road, Suite 105

Rockwall, Texas 75087

Phone (972) 882-0201

Fax (972) 882-0212

FOR THE STATE OF TEXAS

MR. D. BRIAN BLESSING

Attorney at Law

State Bar No. 02486500

P.O. Box 1254

Rockwall, Texas 75087

Phone (972) 771-9954

Fax (972) 722-3097

FOR THE DEFENDANT

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3

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1 **PROCEEDINGS**
2 **THE COURT:** Cause No. 2-03-451, Cause No.
3 2-03-279, 2-03-280, styled The State of Texas versus
4 John Thomas Tello.
5 Is the State here and ready?
6 **MR. CONRADT:** State's ready, Your Honor.
7 **THE COURT:** Counsel for defendant is
8 present?
9 **MR. BLESSING:** Yes, I'm present, Your
10 Honor, but I'd announce not ready. We have filed a
11 Motion for Continuance which includes, among other
12 things, that the defendant did not receive certified
13 notice -- mailed notice of this hearing until yesterday,
14 the 19th of May.
15 I have talked with the defendant. He
16 tells me that he is in Dallas and he's en route to the
17 courthouse and that -- but he's not present at this
18 particular time.
19 **THE COURT:** What type of notice was he

20 given?

21 MR. CONRADT: Judge, the State would ask
22 the Court to take judicial notice of the hearing back
23 on April the 29th, 2005, in which the defendant
24 stated his address at that time was 3033 Larry Drive
in
25 Dallas. The notice that the clerk sent the State I

May 20, 2005, Proceedings

5

1 would also ask you to take judicial notice of. I think
2 the order setting this hearing was signed on May the
3 6th, and the State would ask that you take judicial
4 notice of the setting letter in each of these three
5 files. It's dated May the 6th, addressed to the
6 defendant, setting this hearing today at 1:00.

7 THE COURT: Anything else?

8 I'll ask the bailiff to call the
9 defendant three times in the hall.

10 THE BAILIFF: The name was called three
11 times in the hail. There was no response.

12 THE COURT: Let the record reflect then
13 that the hearing was set at 1:00. It is now
14 approximately 1:40 p.m. The defendant has failed to
15 appear. Bonds in all three cases will be forfeited.
16 Judgment nisi will be issued in each case, and there
17 will be no new bond set at this time.

18 (Recess had. Defendant enters the court-
19 room. All counsel present)

20 THE COURT: Mr. Tello, if you want to
21 come up.

22 I have already called this case. I
23 called it at about 1:40, at which time you were not
24 present. I'll tell you that I find it hard to believe
25 you weren't present for a hearing that is trying to

1 determine whether or not your bond ought to be
2 revoked. But I forfeited your bond in all three
3 cases. A warrant will be issued for your arrest.
4 However, in keeping with what I would do with every
5 other person that's on bond, you're here now, you're
6 about an hour and a half late, you need to tell me
why

7 you weren't here at 1:00.

8 MR. TELLO: I was in the process of
9 filing notice of removal. When I got down to the
10 federal clerk's office, the clerk that was there
11 appeared to not really know how to do these things.
12 And he was having trouble getting the cover
document

13 that have to be filled out off of his Internet web
14 site, so he had to get his supervisor in to show him
15 how to do that and then print them out for me. And
16 then I filled them out, gave them to him.

17 And then there was the issue of
18 subpoenas. We have four of those, and they
questioned
19 whether we can issue those subpoenas. So then we
had
20 to bring the supervisor back in. She reviewed it and
21 said, well, okay, I guess we can do these. And that
22 took a lot longer than we had expected.

23 THE COURT: What time did you get there?

24 MR. TELLO: My gosh. We had to be here
25 at 1:00. I went down there approximately 10:30,

1 10:45. I started on this. I thought I'd just be able
2 to drop this stuff off. But that was not possible.
3 She required several copies of things. So then I got
4 to make change in the change maker and make copies
of

5 all this. I did not realize they were going to require
6 so many copies of these documents after I filled them
7 out. So it's a very slow copier to do that. It just
8 took more time than I even knew was going to be
needed
9 to file these documents. I had the documents finished,
10 but the clerk required of me these additional forms
11 that I didn't know about. So as soon as I finished
12 them, I called my attorney, Mr. Blessing, and told
him
13 that I'd be right out. I got here as quickly as I
14 could.
15 I apologize to the Court for being late.
16 THE COURT: It's just kind of a serious
17 hearing to be late for.
18 But, Brian, do you have anything you want to
19 add?
20 MR. BLESSING: No, I don't.
21 THE COURT: All right. Mr. Tello, I'll
22 take you at your word on that. I'm going to reinstate
23 your bond in all three of these cases. And it's my
24 understanding that with regard to these
conditions that
25 I have placed on your bonds, that – one of the

May 20, 2005, Proceedings

8

1 allegations in the State's motion had to do with
where
2 you were living and that it was near a daycare
center
3 or something of that nature. It's my
understanding
4 you've moved.

5 MR. TELLO: There's a church. As soon as
6 I was informed that there was an issue there, I
7 immediately moved to a hotel where I knew there
8 wouldn't be an issue until we could have a chance to

9 talk about it.

10 THE COURT: Your residence address is
11 what now? What is it now?

12 MR. TELLO: It's Highway 67. It's called
13 the Crossroads Motel. I reported that address
and
14 phone number to the Sheriff's department on
the 15th.

15 THE COURT: Okay. Do you have a
16 telephone number and a room number?

17 MR. TELLO: Yes, I do.

18 THE COURT: Go ahead and tell them what
19 that is.

20 MR. TELLO: I'm in room 206. My
21 telephone number is (214) 564-9664.

22 THE COURT: And that's going to be your
23 address while you're on appeal?

24 MR. TELLO: Yes, sir.

25 THE COURT: Okay. And you understand

May 20, 2005, Proceedings

9

1 that if you change that address, you have to notify
the

2 Court? Do you understand that?

3 MR. TELLO: I will. I understand.

4 THE COURT: Now, moving does solve
that

5 problem, but you need to understand that this
is not a

6 - these are not conditions of probation. These
are

7 conditions of bond. So you have to take them

8 literally. It means that you can't be within 1,000

9 feet of these places, whether it's for work
purposes or

10 whether it's going to visit this house or
whatever.

11 You just can't be in these areas. If you got to be
12 somewhere where your work requires you to be
close,
13 within 1,000 feet, you just need to make
arrangements
14 ahead of time to have somebody else do that
particular
15 job. You just got to follow these things literally.
16 And as long as you -- I just want to have a clear
17 understanding on that. As long as you do, I
don't
18 think we're going to have a problem.

19 Does the State have anything they want to
20 add?

21 MR. CONRADT: No, Your Honor, other than
22 asking that this hearing be continued to another
date.

23 THE COURT: Well, let me ask you one
24 other thing, Mr. Tello. One of the things that you're
25 required to do as a condition of these bonds is you

May 20, 2005, Proceedings

10

1 have to prosecute your appeal in this case. That's the
2 point of the bonds is to allow you to be on bond, but
3 you have to prosecute with normal speed the appeals
4 in these cases. I'm a little bit concerned that that's
5 not happening. Can you bring me up to where you are
on
6 the appeal process?

7 MR. TELLO: As far as I know, all of the
8 requirements that -- are being filed in a timely
9 manner. The brief is being constructed right now.

10 THE COURT: You haven't paid the clerk
11 yet, have you, here in Rockwall? I know that's an
12 issue for you, but that's something you need to visit
13 with your attorney about and get some legal advice. I

14 don't know what the status is. You filed a mandamus,
15 I

15 guess, with the Dallas Court of Appeals on that.

16 MR. TELLO: Yeah, a question arose as to
17 the form of payments with the person inside the
18 Court

18 of Appeals.

19 THE COURT: Well, at some point in time
20 you need to realize that -- I suppose the Court of
21 Appeals will resolve that question one way or the
22 other, but prosecuting your appeal in a normal and
23 timely manner is one of the conditions of your bonds
24 in

24 all three of these cases, and you've got to do that.

25 So assuming that that's your permanent

May 20, 2005, Proceedings

11

1 address, or at least your address that won't be
2 changing until you've notified us otherwise, and
3 assuming that you literally follow these conditions,
4 staying a thousand feet away from the places that
5 you're not supposed to go, we're going to reset the
6 hearing.

7 Do you have a reset date, sort of a
8 check-back? State have a --

9 MR. CONRADT: At the Court's and Mr.
10 Blessing's convenience.

11 THE COURT: You've reported to the
12 Sheriff's office and everything like you're supposed
13 to?

14 MR. TELLO: Yes, sir. I registered in
15 Mesquite.

16 THE COURT: Now let me ask you. I'm not
17 asking you whether you agree with them or not, but
18 I've

18 gone over what these conditions are and tried to
19 clarify for you today what you've got to do. Do you

20 understand what I've told you today?
21 MR. TELLO: Yes, sir.
22 THE COURT: Do you have any questions?
23 MR. TELLO: None at this time.
24 THE COURT: All right. Do you want to
25 get a reset date now so that we can give Mr. Tello

May 20, 2005, Proceedings

12

1 notice today, and --
2 MR. CONRADT: Yes, sir.
3 THE COURT: -- then I can tell him to
4 come back on that date?
5 MR. CONRADT: Yes, Your Honor.
6 THE COURT: And the purpose of that
7 hearing would be what? Simply a check-back to
be sure
8 that these conditions --
9 MR. CONRADT: Check back to see
whether
10 or not the State may need to file an amended
motion to
11 revoke the appeal bond.
12 THE COURT: As of today then, based on
13 the allegations that you have in your current motion,
14 the bond will stay -- the bonds will stay intact as
15 they are, assuming that you follow the conditions
that
16 we've set out.
17 And then if you will go to the
18 coordinator's office and get another date, I'll
advise
19 Mr. Tello when he's got to come back.
20 MR. CONRADT: Judge, it's up to you,
21 whenever you want to do it.
22 THE COURT: Well, let's see. How about
23 June the 3rd? It's a Friday. Say at 1:00?
24 MR. CONRADT: 1:00 on the 3rd? Yes, sir.

1 only notice. I'm advising you you need to
appear for a

2 follow-up hearing, a check-back hearing, on
June the

3 2nd at 1:00.

4 MR. TELLO: What's the purpose of that
5 hearing?

6 THE COURT: The hearing is to determine
7 that you have complied with these conditions
and that

8 you have – that you do understand the
conditions. And

9 it's just basically to check in as opposed to –
you

10 still have to check in with the Sheriff's office,
but

11 it's a check-back to be sure that there's no
12 confusion.

13 I'm concerned, number one, that you
were

14 late today.

15 I'm concerned, number two, maybe
16 literally, that some of these haven't been
followed.

17 I'm satisfied with what you've told me
18 today. You've moved. You've taken care of that.
I'm

19 satisfied that you've assured me that you're not
going

20 to go within a thousand feet of any of the places
21 you're prohibited from going, even if it's for
work

22 purposes. You understand that somebody else
has got to

23 do that. As long as you keep with that and there
are
24 no other violations or no additional violations, I
25 don't anticipate anything will happen at this
hearing

May 20, 2005, Proceedings

14

1 – at the next hearing. But if there are
additional
2 violations or – if there are additional violations
–
3 that's the purpose of the hearing is to
determine
4 whether there is compliance. So stay in touch
with
5 Mr. Blessing.
6 I'm in receipt of this, ⁸ and if I get an
7 order from the higher court that tells me to do
or not
8 to do something regarding this case, you can be
sure
9 I'll follow it.

10 MR. TELLO: Thank you.

11 THE COURT: Thank you, sir.

12 MR. BLESSING: Thank you, Judge.

13 MR. CONRADT: Thank you, Judge.

14 (End of proceedings)

MARY ANN GILBERT, CSR, RMR, RDR
382nd Judicial District Court

⁸ The Notice of Removal.

**2005 May 23—Federal, Tello's First Motion for
Contempt**

COPY

**U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED**

MAY 23 2005

CLERK, U.S. DISTRICT COURT

By _____
Deputy

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

STATE OF TEXAS, §
a federal corporation §
Plaintiff, §

v. § Case No. 3:05-CV-1042-M

JOHN THOMAS TELLO, §
Bonded Releasee, § [became 3:05-CV-1049-B]
Defendant. § [became 3:05-CV-1049-N]

**TELLO'S FIRST VERIFIED MOTION
FOR CONTEMPT**

Assertion of Rights

Tello asserts all his rights and privileges at Natural Law, Common Law and Maritime Law, as well as any statutory rights that exist and apply.

Motion

Tello moves that "judge" Brett Hall, 382nd District Court, Rockwall County, Texas, be held in contempt for violating the automatic stay incumbent with removal.

Discussion

Automatic Stay

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall

file a copy of the notice with the clerk of such State court, which shall effect the removal **and the State court shall proceed no further unless and until the case is remanded.**

28 U.S.C. § 1446(d) (emphasis added).

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect **until dissolved or modified by the district court.** [12]

28 U.S.C. § 1450 (emphasis added).

"The statutory procedures for removal of a case from state court to federal court provide that the removal acts as a stay of the state-court proceedings. 28 U.S.C. 1446(e)." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977). This statement appears in a paragraph of examples of statutory authority affirmatively authorizing a federal court to stay a state court proceeding, i.e., exceptions to the Anti-Injunction Act.

There are seven statutes in addition to 42 U.S.C. 1983 which the Court has recognized constitute "express exceptions" to the policy of nonintervention in state proceedings enunciated by the anti-injunction statute: ... (7) Legislation providing for the removal of litigation to federal courts and **the simultaneous cessation of state court proceedings**, 28 U.S.C. 1446 (e). See *French v. Hay*, 22 Wall. 250.

O'Shea v. Littleton, 414 U.S. 488, 512 (1974) (Douglas, J. dissent) (Appendix) (emphasis added).

Flagrant Violation of The Automatic Stay—Via "orders" that Deny Due Process (under color of law and color of office and that Tortious Interfere with Commerce.⁹

Tello will file a transcript of the proceeding of 20 May

⁹ As such in original. Needs "X."

2005 as soon as it becomes available. In lieu of that transcript, Tello includes his verified statement with this motion. In short, "judge" Hall revoked Tello's bond, which non-judicial, **political** act, alone, more than triggers the "shock the conscious" standard. The alleged reason: Tello was late to the hearing (that no longer existed due to the removal). Then, upon **again** learning that the reason for not being there sooner was filing this Removal proceeding, he reinstated the Bond he had no authority to revoke in the first place.

Then, just exactly as stated in the Notice of Removal filed in the morning, "judge" Hall proceeded tortiously to interfere with Tello's temporary residence, [13] "ordering" Tello to find a residence outside the "child safety zone," and with Tello's business activity, "ordering" him not to work any of his customer's air conditioning units, if the customer's location is within the "child safety zone." **ALL OF THIS IS IN FLAGRANT VIOLATION OF THE STATUTORY DEFENSES, PRIVILEGES AND RIGHTS TELLO HAS.** See TEX. CODE CRIM. PROC. ANN. Art. 42.12 § 13B(i) (West Supp. 2004-2005). There is no authority on the face of the planet that allows a state judge to turn the "child safety zone" into a "bright line" rule, thereby stripping the person of his STATUTORY (or any other) defenses. That zone **never** exists without its affiliated and associated defenses, privileges and rights.

Request for Relief

Therefore, Tello requests that this court hold "judge" Hall in contempt for his outrageous and unconscionable defiance of the law of "this state" by his even holding the hearing. (When Case No. 3:04-CV-1718-N was filed, Hall immediately stopped the revocation proceeding, which more than proves that he's **not** working on the "I had no idea" principle, here.) Also, Tello requests that this court formally declare as void any and all "orders" that "judge" Hall issued in repugnant defiance of the automatic stay.

Respectfully submitted,

/s/ John Tello

John Tello

Without prejudice

P.O. Box 870983

Mesquite, Texas 75187 [14]

Verification

Per 28 U.S.C. § 1746(1), territorial to Texas, and under the laws of perjury defined by the United States of America, I, John Tello depose and declare (or certify, verify or state), that I am at least 21 years of age, that I am competent to make this Affidavit, that I have personal knowledge of these facts, and that these facts are true and correct.

All of the facts alleged in this motion are true and correct.

I appeared in the 382nd District Court to deliver, in person, the Notice of Removal to the Clerk. While I had someone actually filing those Notices, I went to the courtroom. A few minutes passed, and the Clerk came rushing into the courtroom waiving the three copies of the Notice of Removal that had just been filed. She placed them on the bench. "judge" Hall glanced at them long enough to recognize what they were, brushed them aside, and proceeded to begin the hearing in the case that had just been removed. It was obvious that even the Clerk knew Hall had no authority.

"judge" Hall revoked my Bond. He reinstated it once I repeated what he already knew, which is that I was at the Clerk's Office for the Northern District of Texas filing, and filling out the forms accompanying, the Notice of Removal.

Then, "judge" Hall "ordered" me to relocate, since my

initial temporary residence was allegedly within a "child safety zone." Then, he "ordered" me not to attend to my customers who are within a "child safety zone." Then, he set **another** Bond-related hearing for 2 June 2005.¹⁰

In short, he held one hearing, and set another, in complete defiance of the automatic stay, and, **without any evidence** of Record, tortiously interfered with my commercial activities, and completely ran over roughshod the residence exception to the "child safety zone," thereby effectively granting the motion to revoke, without ultimately revoking the Bond. It's a **political** decision that completely ignores Due Process, separation of powers and the fully and directly applicable statutory defenses, privileges and rights anyone on "community supervision" and subject to a "child safety zone" has.

I have **never** been outside the course and scope of my employment regarding ANY of the "trespass theory" (the "child safety zone") charges since this whole thing against me got started. I was incarcerated for more than NINE MONTHS over this.

Further Declarant sayeth not.

Executed on: 5-21-2005

/s/ John Tello
John Tello [15]

Certificate of Service

By my signature below, I certify that on this the 23rd day of May, 2005, I served a true and correct copy of this verified motion, by certified mail, return receipt requested, as follows:

Hon. GREG ABBOT

Attorney General

STATE OF TEXAS

P.O. Box 12548

AUSTIN, TX 78711-12548

RAY SUMROW

Rockwall County DA's Office

Rockwall County Government

Center

1101 Ridge Road

¹⁰ Typo. Should read "3 June 2005."

ROCKWALL, TX 75087

RICHARD B. ROPER
United States Attorney
Northern District of Texas
1100 Commerce, 3d Floor
DALLAS, TX 75242-1699

Hon. ALBERTO R.
GONZALES
Attorney General, United
States
10th & Pennsylvania Avenue,
N.W.
WASHINGTON, DC 20530

"judge" Brett Hall
c/o Clerk, 382nd District Court
Rockwall County
1101 Ridge Road, Suite 209
ROCKWALL, TX 75087

Status Report copies sent by regular mail as follows:

Mr. Charles R. Fulbruge, III
Clerk, US Court of Appeals,
Fifth Circuit
600 Camp Street
New Orleans, Louisiana
70130
(No. 04-11424)

Ms. Lisa Matz, Clerk
Fifth District Court of
Appeals at Dallas
600 Commerce Street, 2d
Floor
Dallas, Texas 75202
(Nos. 05-05-368-CR, -369-
CR, -370-CR)

/s/ John Tello
John Tello

**2005 June 3—State, Second Post-Removal Bond
Revocation Hearing**

ORIGINAL 1

1 REPORTER'S RECORD

2 VOLUME 1 OF 1 VOLUME

3 TRIAL COURT CAUSE NO. 2-03-279

4 TRIAL COURT CAUSE NO. 2-03-280

5 TRIAL COURT CAUSE NO. 2-03-451

6 STATE OF TEXAS) IN THE DISTRICT
7) COURT

8 VERSUS)
9) ROCKWALL COUNTY,
10) TEXAS

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BY: MR. LOUIS W. CONRADT

Assistant District Attorney
State Bar No. 04709700

-and-

MS. ANGELA CONVERSE

Assistant District Attorney
State Bar No. 24025220

Rockwall County Government Center
1101 Ridge Road, Suite 105

Rockwall, Texas 75087

Phone (972) 882-0201

Fax (972) 882-0212

FOR THE STATE OF TEXAS

MR. D. BRIAN BLESSING

Attorney at Law
State Bar No. 02486500

P.O. Box 1254
Rockwall, Texas 75087

Phone (972) 771-9954

Fax (972) 722-3097

FOR THE DEFENDANT

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3

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1 PROCEEDINGS

2 THE COURT: This is Cause No. 2-03-280,

3 2-03-279, and 2-03-451, styled The State of Texas

4 versus John Thomas Tello. In each case let the record

5 reflect that the hearing is set today for a check back

6 to determine compliance by Mr. Tello with the

7 conditions of his appeal bond.

8 Let the record show that by hearing dated

9 May 20th, 2005, Mr. Tello was specifically ordered by

10 the Court to return today at 1:00 for a compliance

11 hearing and a check back to be sure that he

12 understood

13 the conditions of his bond.

14 I'll ask the bailiff to call Mr. Tello

15 three times in the hall.

16 Any response?

17 THE BAILIFF: No, sir. I called John

18 Tello three times in the hallway. There was no

19 response.

20 THE COURT: Let the record also reflect

21 that Mr. Tello has filed several documents with

22 the

23 federal court seeking to remove, in essence, a

24 hearing

25 with regard to conditions of his bond to federal

26 court. I've asked the State to review that

27 statute.

28 Does the State have an opinion as to

25 whether or not such an action is removable?

June 3, 2005, Proceedings

5

1 MR. CONRADT: Judge, I think that the
2 defendant has attempted to remove the
underlying
3 criminal cases in these three cause numbers.
I'm not
4 aware of any pleading that he has sought to
remove the
5 bond – the appeal bond portion of these
hearings.

6 THE COURT: I thought that's what he
7 filed on May 20th.

8 MR. BLESSING: He filed on May 20th
9 a proceeding that attempted to under 1446
remove
10 the hearing on the motion to revoke the bond.
That's what
11 that particular filing was on the day of the
hearing.

12 MR. CONRADT: Well, Judge, by the face
of
13 – I believe it's Title 28, Section 1446, of the
United
14 States Code, there is a procedure by which
criminal
15 cases can be removed, but I think this
defendant is
16 mistaken as to the nature of the matters before
the
17 Court currently.

18 Additionally, I think he has untimely
19 filed his notice of removal.

20 THE COURT: In what manner?

21 MR. CONRADT: Well, I think that the
22 Section (c) – (c) (1) of Section 1446 requires that

the
23 notice of the removal of a criminal prosecution
shall
24 be filed not later than 30 days after the
arraignment
25 in state court. And we're long past arraignment.

June 3, 2005, Proceedings

6

1 We're on to a probated judgment, probation
revocation,
2 and a hearing on that probation revocation and
then a
3 bond setting – appeal bond setting on April the
29th
4 of this year. I just think he's too late.

5 MR. BLESSING: And, Your Honor, just
for
6 purposes of the record, the defendant's position
is
7 that he's met the conditions under Title 28,
Section
8 1446.

9 THE COURT: All right. Let the record
10 show that the defendant has failed to appear.
His bond
11 is revoked in all three cases. A warrant will
need to
12 be issued for his arrest. And further show that
if
13 federal court or any other court orders a stay of
this
14 order, the Court will allow it.

15 MR. CONRADT: Thank you.

16 THE COURT: And judgment nisi would need
17 to be issued.

18 MR. CONRADT: Thank you, Judge. May I be
19 excused?

20 THE COURT: Yes.
21 (End of proceedings)

MARY ANN GILBERT, CSR, RMR, RDR
382nd Judicial District Court

2005 June 3—State, Capias, Bond Revocation

FILED FOR RECORD
ROCKWALL CO., TEXAS
2005 JUN -6 PM 2:04
KAY MCDANIEL
DISTRICT CLERK
BY _____ DEPUTY

ALIAS CAPIAS

THE STATE OF TEXAS

Cause No. 2-03-279

TO ANY PEACE OFFICER OF THE STATE OF TEXAS -
GREETINGS:

YOU ARE HEREBY COMMANDED TO ARREST:

JOHN THOMAS TELLO
2544 Hwy. 67 #206 (zip 75150)
P.o. Box 870983
Mesquite, Tx. 75187

DOB: 01/19/58 Sex: M Race: White

And him safely keep, so that you have Him before the
Honorable 382nd Judicial District Court of Rockwall
County, Texas, at the Government Center of said County
in the city of Rockwall, Texas, INSTANTER, then and
there to answer the State of Texas upon an Order by the
Court for Defendant's failure to appear in said Court.
Defendant's Bond was declared forfeited.

HEREIN FAIL NOT, but due return make hereof as the law directs.

Witness my signature and official seal, on this day, 3rd day of June, 2005.

KAY MCDANIEL, DISTRICT CLERK
Rockwall County, Texas

By: /s/ S Hill
Deputy

ORIGINAL CHARGE: Motion to Revoke Probation
INDECENCY W/ A CHILD SEXUAL CONTACT
AMOUNT OF BAIL: \$NO BOND WAS SET AT THIS
TIME

OFFICER'S RETURN

Came to hand on the 3RD day of JUNE, 20 05
and executed on the 3RD day of JUNE, 20 05 by
arresting the within named DEFENDANT at US
DISTRICT COURT in DALLAS County, Texas and
* taking his bond which is herewith returned, placing
HIM in the County Jail of ROCKWALL County,
Texas. Returned on this the 3RD day of JUNE,
20 05.

HAROLD EAVENSON, SHERRIFF ¹²
Rockwall County, Texas

By: /s/ ? 524
Deputy

*ERASE ACCORDING TO THE FACTS
COURT RETURN COPY

¹² As such in original.

**2005 June 7—Federal, Tello's Second Motion for
Contempt**

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

JUN 7 2005
CLERK, U.S. DISTRICT COURT

By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STATE OF TEXAS,	§	
a federal corporation	§	
Plaintiff,	§	
v.	§	Case No. 3:05-CV-1049-N
JOHN THOMAS TELLO,	§	
Bonded Releasee,	§	
Defendant.	§	

**TELLO'S SECOND VERIFIED MOTION
FOR CONTEMPT**

Assertion of Rights

Tello asserts all his rights and privileges at Natural Law, Common Law and Maritime Law, as well as any statutory rights that exist and apply.

Motion

Tello moves that "judge" Brett Hall, 382nd District Court, Rockwall County, Texas, be held in contempt, **a second time**, for violating the automatic stay incumbent with removal.

Discussion

Automatic Stay—For the Second Time!

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give

written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court which shall effect the removal **and the State court shall proceed no further unless and until the case is remanded.**

28 U.S.C. § 1446(d) (emphasis added).

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect **until dissolved or modified by the [12] district court.**

28 U.S.C. § 1450 (emphasis added).

"The statutory procedures for removal of a case from state court to federal court provide that the removal acts as a stay of the state-court proceedings. 28 U.S.C. 1446(e)." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977). This statement appears in a paragraph of examples of statutory authority affirmatively authorizing a federal court to stay a state court proceeding, i.e., exceptions to the Anti-Injunction Act.

There are seven statutes in addition to 42 U.S.C. 1983 which the Court has recognized constitute "express exceptions" to the policy of nonintervention in state proceedings enunciated by the anti-injunction statute: ... (7) Legislation providing for the removal of litigation to federal courts and **the simultaneous cessation of state court proceedings**, 28 U.S.C. 1446 (e). See *French v. Hay*, 22 Wall. 250.

O'Shea v. Littleton, 414 U.S. 488, 512 (1974) (Douglas, J. dissent) (Appendix) (emphasis added).

Flagrant Violation of The Automatic Stay—A second hearing.

Tello will file a transcript, if there is one, of the proceeding of 3 June 2005 as soon as it becomes available. In lieu of that transcript, Tello includes his verified

statement with this motion. In short, "judge" Hall held a **second** hearing in this **removed** matter. The automatic stay in federal law is not sufficient for him. As he specifically noted in the first hearing after he received notice of the removal, as recorded in that transcript, he's so special he doesn't have to respect any automatic stay that all other state judges have to respect. He stops only when a specific order telling him to stop is somehow specially delivered to him.

To allow Hall one last-ditch effort to save face, what little may be left, Tello filed [13] on Wednesday, 1 June 2005, his Notice of Appeal of Bail/Bond, per TEX. R. APP. P. 31. That's an expedited appellate process, which normally tells a state judge that his authority over that matter has been terminated and has been transferred to the appellate court. But, even *that* had no effect on "judge" Hall. Tello in no way feels that there's a pending state process *to* appeal, but if it's a message communicated in the language that the "judge" *can* hear, then the objective is accomplished. And, where Hall defies even *that* law, his lawlessness and completely out of control character is simply made all the more manifest. It's impossible to avoid or ignore the retaliation, under color, against a federal witness aspect of "judge" Hall's conduct.

Request for Relief

Therefore, Tello requests that this court hold "judge" Hall in contempt, for a **second** time, for his outrageous and unconscionable defiance of the law of "this state" by his even setting, much less holding, that **second** hearing. Tello again requests that this court formally declare the obvious, that any and all "orders" "judge" Hall has issued in repugnant defiance of the automatic stay are void on their face. Tello also has incurred attorney's fees and costs regarding these state court hearings and costs for these federal proceedings that "judge" Hall must be compelled to pay.

Respectfully submitted,

John Tello
Without prejudice
P.O. Box 870983
Mesquite, Texas 75187 [14]

Verification

Per 28 U.S.C. § 1746(1), territorial to Texas, and under the laws of perjury defined by the United States of America, I, John Tello depose and declare (or certify, verify or state), that I am at least 21 years of age, that I am competent to make this Affidavit, that I have personal knowledge of these facts, and that these facts are true and correct.

All of the facts alleged in this motion are true and correct.

In the Verification for the First Motion for Contempt, I had a typo. The **second** hearing that "judge" Hall set was for Friday, 3 June 2005, not 2 June 2005. Hall proceeded with that **second** hearing, despite not only this removal proceeding, but also Tello's Notice of Appeal of the bond matter, per TEX. R. APP. P. 31.

At or around 2:00 o'clock, p.m., on Friday, 3 June 2005. I was physically present in the Clerk's Office, Northern District of Texas, 1100 Commerce, 14th Floor, Dallas, Texas 75242, ready to file this Second Motion for Contempt, waiting on confirmation that "judge" Hall had both called and proceeded with that **second**, post-removal, Bond revocation hearing. At that time, a U.S. Marshal arrested me, without warrant, for not appearing at that **second**, post-removal hearing.

Since there is nothing "pending" in the 382nd District Court regarding this Bond matter, and since my Bond terms specifically state that (only) where there is a matter

"pending" is my presence required, and since the following meeting locations are clearly within 1,000' feet of the Rockwall County Government Center, at 1101 Ridge Road, because they are in or associated with the shopping center directly across the street from the courthouse, it follows that for me to be at the courthouse where there is *nothing* "pending" and I have no other business there puts me at risk of violating the stated conditions of my Bond:

1. Peppermint Kids Children's Boutique
1102A Ridge Road
(maybe 50' away) (this is directly across the street west from the courthouse)
2. All-American Driving School
1106A Ridge Road
(south, about six doors or so)
3. Karate
1117B Ridge Road
(same shopping center)
4. Children's Dance Force (a ballet and dance school)
(same shopping center) [15]

"judge" Hall keeps putting me into factually and legally impossible circumstances. When will this lawlessness end? Who pays my attorney's fees and costs for state court proceedings that should *never* have existed?

Further Declarant sayeth not.

Executed on: _____
John Tello

Certificate of Service

By my signature below, I certify that on this the 7th day of June, 2005, I served a true and correct copy of this verified motion, by certified mail, return receipt requested, as follows:

Hon. GREG ABBOTT
Attorney General
STATE OF TEXAS
P.O. Box 12548
AUSTIN, TX 78711-12548

RICHARD B. ROPER
United States Attorney
Northern District of Texas
1100 Commerce, 3d Floor
DALLAS, TX 75242-1699

RAY SUMROW
Rockwall County DA's Office
Rockwall County Government
Center
1101 Ridge Road
ROCKWALL, TX 75087

Hon. ALBERTO R.
GONZALES
Attorney General, United
States
10th & Pennsylvania Avenue,
N.W.
WASHINGTON, DC 20530

"judge" Brett Hall
c/o Clerk, 382nd District Court
Rockwall County
1101 Ridge Road, Suite 209
ROCKWALL, TX 75087

Status Report copies sent by regular mail as follows:

Mr. Charles R. Fulbruge, III
Clerk, US Court of Appeals,
Fifth Circuit
600 Camp Street
New Orleans, Louisiana
70130

(No. 04-11424)

Ms. Lisa Matz, Clerk
Fifth District Court of
Appeals at Dallas
600 Commerce Street, 2d
Floor
Dallas, Texas 75202
(Nos. 05-05-368-CR, -369-
CR, -370-CR)

John Tello

2005 June 23—State, The *Extortionate* Judgment(s)
Nisi

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
JUN 03 2005

AM PM
7|8|9|10|11|12|1|2|3|4|5|6

STATE OF TEXAS

IN THE DISTRICT
COURT

VS.

JOHN THOMAS TELLO

Defendant-Principal,

JO NELL KINNARD, AGENT

FINANCIAL CASUALTY ¹³

& SURETY, INC.

D/B/A BEST PRICE

BAIL BONDS

Defendant-Surety

382ND JUDICIAL

DISTRICT

ROCKWALL COUNTY,
TEXAS

JUDGMENT NISI

On the 3RD DAY OF JUNE, 2005, this case was called for STATUS CHECK HEARING for compliance with conditions of APPEAL BOND wherein the State of Texas, appeared by her Assistant Criminal District Attorney, but Defendant **JOHN THOMAS TELLO**, ¹⁴ who was released from custody pending an appeal on the conviction for INDECENCY ¹⁵ W/A CHILD and was duly ordered to appear for a hearing to determine compliance with conditions of his appeal bond pursuant to the state's

¹³ As such in the original.

¹⁴ As such in the original.

¹⁵ As such in the original.

Motion to Revoke Appeal Bond, named defendant, **JOHN THOMAS TELLO**, failed to appear and answer in Defendant's behalf. Whereupon **JOHN THOMAS TELLO 'S** ¹⁶ name was called distinctly at the door of the courthouse and a reasonable time having been given in which to appear after the call was made, the defendant-principal did not appear but wholly made default.

It appears to the Court that the Defendant, **TELLO, JOHN THOMAS** as Principal, together with **JO NELL KINNARD, AGENT D/B/A BEST PRICE BAIL BONDS, AGENT D/B/A BEST PRICE BAIL BONDS**, AS surety, on the **28TH DAY OF APRIL, 2005** did enter into a bail bond payable to the State of Texas in the penal sum of \$ 15,000.00. ¹⁷ conditioned that the Defendant should make personal appearance to answer the criminal charge before this Court at the 382nd Judicial District Court in Rockwall County, Texas, and there remain from day to day and from term to term of said Court until discharged by due course of law.

IT IS THEREFORE ORDERED that the bond is forfeited and the State of Texas have and recover from all Defendants, jointly and severally, the amount of the bond, post-judgment interest at the maximum rate allowed by law, costs of court, and all necessary and reasonable expenses that may be incurred and occasioned by all Sheriffs and other Peace Officers in arresting the Defendant.

IT IS FURTHER ORDERED that the Clerk shall issue citation to all parties as required by law, and that this Judgment Nisi shall become final unless the Defendant appear and show good cause why the Defendant did not appear on this date and why this judgment of forfeiture

¹⁶ As such in original.

¹⁷ As such in original.

should not be made final. ¹⁸

IT IS FURTHER ORDERED that an alias capias issue for the arrest of the Defendant and That **NO BOND WAS SET AT THIS TIME.**

Signed this 3 day of June, 20 05

Original Signed By
BRETT HALL

JUDGE PRESIDING

THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT ON FILE IN MY OFFICE.

[Circular SEAL of DISTRICT CLERK ROCKWALL COUNTY]

**KAY McDANIEL
DISTRICT CLERK
ROCKWALL COUNTY, TEXAS**

By /s/ ? 06 23 05

[12]

CAUSE NO. 2-03-279

THE STATE OF TEXAS

To any Sheriff or any Constable within the State of Texas - GREETING:

WHEREAS, on the 28TH DAY OF APRIL, 2005 in a certain prosecution pending in the 382nd District Court of Rockwall County, Texas, Cause no. ¹⁹ **2-03-451**, ²⁰ wherein

¹⁸ Tello made a Special Appearance, with Special Exceptions, and asserted a host of defenses and affirmative defenses. Tello's Verified Original Answer to Hall's *Extortionate* Judgments Nisi is 14 pages.

¹⁹ As such in original.

²⁰ As such in original.

THE STATE OF TEXAS is Plaintiff, and **JOHN THOMAS TELLO**, Defendant, the said Defendant as principal, together with **FINANCIAL CASUALTY ²¹ & SURETY INC. D/B/A BEST PRICE BAIL BONDS, JO NELL KINNARD AGENT**, as surety, did enter into a Surety bond, payable to the State of Texas in the penal sum of **(\$15,000.00) FIFTEEN THOUSAND DOLLARS**.

CONDITIONED, that the said Defendant should make his personal appearance before the Court on the **INSTANTER** then and there to answer the Sate of Texas upon a charge by **INDICTMENT** duly presented in said Court, wherein the said Defendant is charged with the offense of **INDECENCY W/A/ CHILD**, and there remain from day to day and term to term, until discharged by due course of law; and whereas, on the **3RD DAY OF JUNE, 2005**, **BEFORE SAID** court, then in session, said cause was called for trial, and the said wholly failed to appear and show cause why Judgment should not be made final against him, and thereupon the Surety bond of said **JOHN THOMAS TELLO** was declared forfeited by said Court, and it was ordered, adjudged, and decreed by said Court that the State of Texas do have and recover of the said **JOHN THOMAS TELLO** as principal, the sum of **(\$15,000.00) FIFTEEN THOUSAND DOLLARS**, and of **FINANCIAL CASUALTY & SURETY INC. D/B/A BEST PRICE BAIL BONDS, JO NELL KINNARD AGENT**, as Surety, the sum of **(\$15,000.00) FIFTEEN THOUSAND DOLLARS** each, and it was further ordered and adjudged that said judgment should be made final, unless good cause should be shown on the Monday next after the expiration of twenty days from the date of services hereof, why said Defendant did not appear.

²¹ As such in original.

YOU ARE HEREBY THEREFORE

COMMANDED: That you summon the said **JOHN THOMAS TELLO**, Principal, and the said **FINANCIAL CASUALTY & SURETY INC. D/B/A BEST PRICE BALL BONDS, JO NELL KINNARD AGENT**, surety, as foresaid to be and appear by filing a written answer before the said 382nd District Court of said Rockwall County, on or before Monday next after the expiration of twenty days from the date of service hereof, and show cause why said judgment forfeiture should not be made final.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates hereof, and make due return as the law directs.

Issued and given under my hand and seal of said Court at Rockwall, Texas, this the 23rd day of June, 2005.

ATTEST: Kay McDaniel, District Clerk
382nd District Court
Rockwall County, Texas

By /s/ ? , Deputy

Defendants ²² Copy

²² As such in original.

**2005 June 24—Federal, Remand Order, Bond
Revocation Proceeding**

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:05-CV-
JOHN THOMAS TELLO,	§	1049-N
Defendant.	§	

ORDER

Before the Court are Defendant John Thomas Tello's Notice of Removal, filed May 20, 2005,²³ and his Original Third Party Complaint and Application for Writ of Habeas Corpus filed June 7, 2005. Because Tello has presented no grounds sufficient for the Court to interfere in ongoing state proceedings, the Court sua sponte remands this action to the 382nd District Court of Rockwall County and denies Tello's application for writ of habeas corpus.

BACKGROUND

On March 18, 2004, John Thomas Tello pled guilty to indecency with a child and possession of child pornography. *State v. Tello*, Nos. 2-02-279, 2-03-280²⁴ & 2-03-451 (382nd Judicial District Court of Rockwall County). The state district court placed Tello on five years' probation, with a judgment of deferred adjudication. On July 15, 2004, the Rockwall County Criminal District Attorney moved to revoke Tello's unadjudicated probation for violating the terms of his probation. Tello removed the probation revocation

²³ As such in original.

²⁴ As such in original.

proceedings to

ORDER – PAGE 1 [12]

this court and sought habeas relief. On November 12, 2004, the Court sua sponte remanded to the state district court for lack of subject matter jurisdiction ²⁵ and denied Tello's request for habeas relief. On March 1, 2005, the state district court revoked Tello's probation and sentenced him to seven years' imprisonment. However, the state court allowed Tello to remain free on bond pending appeal. On May 6, 2005, the prosecutor moved to revoke Tello's appeal bond and Tello again removed to this Court. Because Tello is still subject to an ongoing state prosecution and has presented no grounds sufficient to interfere with that prosecution, the Court sua sponte remands this action to the state district court and denies Tello's application for a writ of habeas corpus.

I. REMOVAL WAS NOT PROPER

Tello advances numerous arguments for the illegality of his probation revocation, subsequent sentence and appeal bond revocation in his notice of removal. Tello argues that: (1) the requirement that he remain 1000 feet from certain areas frequented by children is unconstitutionally vague; (2) the federal policy of counseling sex offenders preempts state incarceration of sex offenders; (3) he is being subjected to a malicious prosecution; (4) that both revocation proceedings violated public policy and his right to due process; and (5) the state of Texas ²⁶ has no authority to define crime. Tello requests this Court to hold the hearing on the bond revocation.

The Court once again concludes that Tello presents no

²⁵ Some more accurately, the federal court asserted *Younger* and abstained. Comity, not subject matter jurisdiction, ruled the decision.

²⁶ As clearly identified in the style of all of Tello's filings, STATE OF TEXAS is the party to the litigation, not state, or State, of Texas.

valid basis for removal jurisdiction. Under *Younger v. Harris*, a federal court must abstain from interfering with ongoing state proceedings, except in the most extraordinary cases and upon a showing of

ORDER – PAGE 2 [13]

both great and immediate harm. 401 U. S. 37, 43-45 (1971); see also *Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994) (“if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings.”). Tello has made no such showing. As with Tello’s prior attempt at removal, Tello’s only argument as to the inadequacy of state proceedings is the assertion that the state district judge is a party to the appeal bond agreement; thus, Tello argues, the state district judge has a conflict of interest in deciding whether to revoke the bond. This argument is without merit. The state district judge is not a party to the appeal bond agreement and the Court sees no conflict of interest.

Neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1333 provides jurisdiction for the Court to hear this case. Federal question jurisdiction under 28 U.S.C. § 1331 is constrained by the abstention doctrine as described in *Younger*. Abstention does not turn on whether the appeal bond revocation is considered criminal or civil in nature. In any event, an appeal bond revocation hearing during the pendency of a criminal appeal implicates the same comity concerns that made abstention appropriate in *Younger*. Furthermore, admiralty jurisdiction under 28 U.S.C. § 1333(1) grants jurisdiction only for cases arising on the high seas or in interstate waterways. Accordingly, the Court lacks subject matter jurisdiction over this case.

II. TELLO IS NOT ENTITLED TO A WRIT OF HABEAS CORPUS

In addition to removing the bond revocation, Tello filed a Third Party Complaint seeking a writ of habeas corpus on the grounds provided in his notice of removal. Tello also challenges the legality of his detention following his arrest on June 3, 2005, on the grounds

ORDER – PAGE 3 [14]

that the state district court improperly revoked his appeal bond during the automatic stay of the state court proceedings effected upon removal.

Federal habeas corpus relief is available only when the applicant has exhausted state remedies,²⁷ state corrective procedures do not exist, or state corrective processes are inadequate to vindicate the rights asserted. See 28 U.S.C. § 2254(b)(1). Such requirements are “designed to protect the state courts’ role in the enforcement of federal law and prevent the disruption of state judicial proceedings.” *Rose v. Lundy*, 455 U.S. 509, 518 (1982). In order to exhaust his state remedies, an applicant must fairly present all of his claims to the state’s highest court. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993).

Tello has provided no basis for concluding that the exhaustion requirement does not apply to him. As described above, Tello’s argument that state procedures are inadequate because the state district judge has a conflict of interest is meritless. Tello also claims that he seeks habeas relief under § 2241 and that § 2254(b)(1) does not apply because he is in custody pursuant to a bond revocation rather than “a person in custody pursuant to the judgment of a State court ...” 28 U.S.C. § 2254(a).

²⁷ As if the state court system is going to overrule the federal court on the issue of what the state trial court can and can’t do during removal!! Thus, there is no “state” remedy to exhaust! This is but one more completely preemptive federal question!

Section 2254 and its exhaustion requirements apply "as long as the person is in custody pursuant to the judgment of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction." *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004) (quoting *Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000)); see also Eric Johnson, *An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to*

ORDER – PAGE 4 [15]

State Administrative Orders: the State Court Judgment as the Genesis of Custody, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 153,162 (2003) ("The ... predominant view is that Congress ... was concerned primarily with the source of the prisoner's custody, rather than with the target of the prisoner's complaint. What matters, on this view, is whether the prisoner's 'custody' is attributable, at least in part, to 'a judgment of a State court.'").

The Court concludes that because Tello's custody²⁸ is attributable to the state court judgment of conviction,²⁹ Tello must exhaust his state remedies.³⁰ Here, Tello has yet to complete even his first appeal as of right to the state court of appeals; thus, Tello has failed to fairly present his claims to the state's highest court. *Deters*, 985 F.2d at 795. Accordingly, Tello has failed to exhaust his state remedies and is not entitled to a writ of habeas corpus.

²⁸ Which occurred during removal, i.e., during the automatic stay.

²⁹ Based on a plea of Not Guilty (or perhaps even the *unthinkable*, a plea of Not True), without any jury-found facts, without any facts subject to judicial notice, without any otherwise incompetent "evidence" agreed to, and based upon the preponderance standard.

³⁰ So that the state's highest court can confirm to the entirety of humanity that, as far as §§ 1446, 1447 and the scope of the automatic stay are concerned, comity works both ways! See, e.g., [D-54 to -58].

CONCLUSION

The Court remands this case to the 382nd District Court of Rockwall County. The Court denies Tello's application for writ of habeas corpus.

SIGNED June 24, 2005.

/s/ David C. Godbey
David C. Godbey
United States District Judge

ORDER – PAGE 5

2005 August 2—Federal, Notice of Appeal of Remand, Bond Removal

[Note: The appeal is docketed as of 2 Aug 2005.]

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

STATE OF TEXAS,	§	
a federal corporation	§	
Plaintiff,	§	
v.	§	Case No. 3:05-CV-1049-N
JOHN THOMAS TELLO,	§	
Bonded Releasee,	§	
Defendant.	§	
v.	§	
HAROLD EAVENSON,	§	
Sheriff, -	§	
ROCKWALL COUNTY,	§	
TEXAS, Custodian of	§	
JOHN THOMAS	§	
TELLO,	§	
Third-Party Defendant.	§	

TELLO'S NOTICE OF APPEAL

Tello appreciates the time and study this court has invested in this matter. Tello reads a predominance of *Younger* abstention and comity as the basis for remand. Tello reads § 2254, thus non-exhaustion of state remedies, as the basis for denial of habeas.

Since Bond is a contractual matter, therefore a *civil* matter, therefore properly subject to removal, and since Bond revocation is evaluated on a preponderance standard, and therefore, if a criminal proceeding, instantly triggers *Blakely*, thus a completely preemptive federal question, as simply one of many, and since revocation of Bond, *especially* during a time of automatic stay, is so remote from any final adjudication, whether valid or void, as to render § 2254 inapplicable, Tello files this Notice of Appeal regarding both the order of remand and the denial of habeas entered on our about 24 June 2005. He appeals to the United States Court of Appeals Fifth Circuit. Tello does not see the present non-ruling on his motions for contempt ³¹ as altering the finality of the remand order.

To further the exchange of study and perspective, Tello provides the following. "A court granting probation and its probationer have a contractual relationship." *Rickels v. Texas*, 108 S.W.3d 900, 902 and n.7 (Tex. Crim. App. 2003) (citing *McDonald v. Texas*, 442 S.W.2d 386, 387 (Tex. Crim. App. 1969)).

Regarding signature, the court may take judicial notice that Tello was transferred out of the Rockwall County Detention Center as of Thursday, 7 July 2005, which is the day before the 24 June Order first arrived at

³¹ There are three. The third one will be subject to Record supplementation on appeal. Notice of Remand didn't occur until after the third motion was "forwarded" (to the 382nd) due to Remand. And, then, it took a phone call to the Clerk's Office to get the Order.

his P.O. Box. A signed original should be expected in roughly one week, for which time period Tello requests the Rule 11 Admonition.³²

Respectfully submitted,

John Tello
Without prejudice

Postal Verification

Per 28 U.S.C. § 1746(1), I, John Tello, declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the following is true and correct.

1. I am John Tello; I am at least 21 years of age; I have personal knowledge of these facts, which facts are true and correct.
2. I have deposited this document in the mail service available to me, with sufficient first class postage, on the same date as my signature below.
3. The additional copies are submitted under separate cover.

Further, Declarant sayeth not.

Mailed and Executed on _____
John Tello

³² Tello never got a Rule 11 admonition. Instead, he got an order, filed 27 Jul 2005 (i.e., after the appeal deadline), striking the unsigned Notice of Appeal. Then, about a week later, to no small amount of pleasant surprise, the confirmation of the docketed appeal arrived.

**2005 August 23—Bond Appeal, State Appellate
Court, Opinion**

AFFIRM; Opinion Issued August 23, 2005.

[Circular SEAL of THE STATE OF TEXAS]

**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-05-00814-CR

No. 05-05-00815-CR

No. 05-05-00816-CR

EX PARTE JOHN THOMAS TELLO

**On Appeal from the 382nd Judicial District Court
Rockwall County, Texas**

Trial Court Cause No. 2-03-279, 2-03-280, 2-03-451

OPINION

**Before Justices Whittington, Moseley, and Lang-Miers
Opinion by Justice Lang-Miers**

John Thomas Tello appeals the trial court's orders revoking his appeal bonds. In two issues, appellant contends the underlying judgments of conviction are void and the bond conditions are unconscionable. We affirm the trial court's orders.

Appellant was charged with two indecency with a child offenses and one possession of child pornography offense. Pursuant to plea bargain agreements, the trial court deferred adjudicating guilt and placed appellant on five years' community supervision in each case. The State later moved to adjudicate guilt, alleging appellant violated the conditions of his community supervision. Following a hearing, the trial judge adjudicated appellant

guilty and sentenced him to seven years' confinement in each case. The appeals from those convictions are pending as cause nos. 05-05-00368-CR, 05-05- [12] 00369-CR, and 05-05-00370-CR, styled *John Thomas Tello v. The State of Texas*.

The trial judge set appeal bonds at \$15,000 in each case ³³ and on April 29, 2005, appellant posted the bonds. Several conditions were set on the bonds, including that appellant not go within 1000 feet of a place where childrer generally gather and that appellant appear for all court hearings. On May 5, 2005, the State moved to revoke appellant's bonds, alleging that he had gone into two daycare facilities. ³⁴

A hearing was scheduled for May 20, 2005 on the motion to revoke the bonds. Appellant did not appear at the scheduled time for the hearing, and the judge revoked appellant's bonds. However, when appellant appeared later that day, the judge reinstated the bonds and listened to appellant's explanation for his tardiness to the hearing and his actions to comply with the appeal bonds. The judge continued the appeal bonds and stressed to appellant what the conditions were. The judge also scheduled another hearing for June 3, 2005 and notified appellant in open court of that hearing. Appellant did not appear at the June 3, 2005 hearing and the judge revoked the appeal bonds.

These appeals followed. In two issues, appellant

³³ Except for the other two of these three cases, in which the Bond amounts are \$65,000 and \$30,000, respectively. The total is \$110,000.

³⁴ Except that Tello never went "into" either building. The first charge has to do with Tello's *work* and his changing the filters on the roof of the client's building, behind which building, unbeknownst to Tello (as just one of *many*), was a day care, which Tello never went "into." The second charge has to do Tello's temporary *residence*, which *residence* was/is allegedly within the 1,000 of the church, with the day school, neither of which buildings did Tello go "into."

challenges the adjudication proceedings and the amount and conditions of the appeal bonds.

We review the trial court's decision regarding bond pending appeal under an abuse of discretion standard. See *Ex parte Turner*, 612 S.W.2d 611, 612 (Tex. Crim. App. 1981). A trial judge abuses his discretion if his ruling is outside the zone of reasonable disagreement. See *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Appellant's first issue attacks the proceeding at which his guilt was adjudicated and he was sentenced to imprisonment. Those issues are not before us in these bond revocation appeals. Accordingly, we resolve appellant's first issue against him. [13]

In his second issue, appellant challenges the amounts and conditions of the appeal bonds. Appellant claims he should have been released on a personal bond and that the conditions of the bonds were unconscionable.

Appellant posted the bonds that were set in these cases. Therefore, his complaint regarding the amount of the bonds is moot. See *Ex parte Guerrero*, 99 S.W.3d 852, 852 ³⁵ (Tex. App.-Houston [14th Dist.] 2003, no pet.) (per curiam).

As to the conditions of the bonds, it appears appellant is complaining of the condition that he not go within 1000 feet of a place where children generally gather. Appellant did not complain about this condition either at the time it was set or at the May 20, 2005 hearing. ³⁶ Therefore, he

³⁵ As such in original.

³⁶ **This is n.1 in the opinion**, which reads as follows: "Appellant sought to remove these appeal bond cases and the underlying cases to federal court. Those attempts were rejected. See *Texas v. Tello*, No. 3:05-CV-1049-N (N.D. Tex. June 24, 2005)."

(This position is 100% predictable. See, *supra*, [D-50] n.30.)

Even if that stands up on appeal, there's still nothing *pending* in

has not preserved the complaint for appeal. See TEX. R. APP. P. 33.1(a)(1).

Moreover, another condition of appellant's bonds was that he appear for all court hearings.³⁷ Appellant makes no complaint regarding the propriety of that condition. The record reflects that on May 20, 2005, appellant was personally notified in open court of the June 3, 2005 hearing, yet appellant did not appear for that hearing. The judgments nisi reflect the judge revoked the appeal bonds when appellant failed to appear for the hearing. We conclude the trial court did not abuse its discretion in revoking the appeal bonds. We resolve appellant's second issue against him.

We affirm the trial court's orders.

/s/ Elizabeth Lang-Miers
ELIZABETH LANG-MIERS
JUSTICE

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TEX. R. APP. P. 47
050814f.u05

the state court, from removal until remand. Further, we'll see whether those conditions are really not there per the terms, and if not, whether Art. 42.12 § 13B(i) supplies them.

³⁷ IF there's something *pending*. A removed matter is not *pending*.

**2005 August 23—Bond Appeal, State Appellate
Court, Judgment**

[Circular SEAL of THE STATE OF TEXAS]

**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

**EX PARTE JOHN
THOMAS TELLO**

No. 05-05-00814-CR

Appeal from the 382nd Judicial
District Court of Rockwall
County, Texas. Tr.Ct.No. 2-
03-279).

Opinion delivered by Justice
Lang-Miers, Justices
Whittington and Moseley
participating.

Based on the Court's opinion of this date, we **AFFIRM**
the trial court's order revoking the appeal bond.

Judgment entered August 23, 2005.

/s/ Elizabeth Lang-Miers
ELIZABETH LANG-MIERS
JUSTICE

Appendix E—Divorce, Parental Rights, Property

[Note: Appendices C, D, and E contain information available by judicial notice. These documents are part of the identified state court Records, but have not previously been made part of the federal trial or appellate Record in the immediate case.]

2004 February 19—"Voluntary" Termination of Parental Rights

FILED FOR RECORD
KAY MCDANIEL, DISTRICT CLERK
ROCKWALL COUNTY, TEXAS
FEB 19 2004
AM PM
7|8|9|10|11|12|1|2|3|4|5|6

[Note: There is no case-style heading for this document.]

FATHER'S AFFIDAVIT FOR VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

STATE OF TEXAS §

COUNTY OF ROCKWALL §

JOHN THOMAS TELLO appeared in person before me today and, in the presence of the undersigned credible witnesses, stated under oath:

"My name is **JOHN THOMAS TELLO**. I am 46 years of age and reside at ~~8223 Hunnicut Road, Dallas, 2306~~ **DRIFTWOOD DR. #304 MESQUITE Texas 75228. 75150** I am the father of the following children:

"**NICHOLAS PAUL TELLO**, a male child born to me on January 18, 1993.

"**SARAH ELIZABETH TELLO**, a female child born to

me on September 19, 1994.

'No person has been appointed or has qualified as guardian of the persons or estates of the children.

"I am presently obligated by court order to make payments for the support of the children.

"A full description, including statement of value, of all property owned or possessed by the children is as follows:

Name of Child: NICHOLAS PAUL TELLO - None

Name of Child: SARAH ELIZABETH TELLO - None

"The mother of the children is **TAMARA TELLO**, and her address is 9 Northcrest Circle, Rockwall, Texas 75087.

"I designate **TAMARA TELLO**, as managing conservator of the children. I have been informed that my parental rights, powers, duties, and privileges are as follows:

1. the right to have physical possession, to direct the moral and religious training, and

JT
Affiant's initials

[12] to designate the residence of the children;

2. the duty of care, control, protection, and reasonable discipline of the children;

3. the duty to support the children, including providing the children with clothing, food, shelter, medical and dental care, and education;

4. the duty, except when a guardian of the estate has been appointed, to manage the estates of the children, including the right as an agent of the children to act in relation to the children's estates if the children's actions are required by a state, the United States, or a foreign government;

5. except as provided by section 264.0111 of the Texas Family Code, the right to the services and earnings of the children;

6. the right to consent to the children's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;

7. the right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

8. the right to receive and give receipt for payments for the support of the children and to hold or disburse funds for the benefit of the children;

9. the right to inherit from and through the children;

10. the right to make decisions concerning the children's education; and

11. any other right or duty existing between a parent and child by virtue of law.

"I freely and voluntarily give and relinquish to **TAMARA TELLO** all my parental rights and duties.

JT

Affiant's initials

[13] 'I fully understand that a lawsuit will be promptly filed in a court of competent jurisdiction to terminate forever the parent-child relationship between me and the children named above. I fully understand that the termination suit may or may not be combined with a suit to adopt my children. I understand that either way, once the Court terminates my parental rights, I have no further say concerning my children, whether or not my children are adopted then or at some later time.

"I know that I have the right to appear personally before the Court, with an attorney of my choice, to testify

about my desires with respect to my children. However, I do not want to go to court in person and choose not to be represented by a lawyer. I want this Affidavit for Voluntary Relinquishment of Parental Rights presented to the Court.

"Because I do not want to testify in person before the Court, I freely and voluntarily waive and give up my right to the issuance, service, and return of citation, notice, and all other process in any suit to terminate my parental rights or in any suit to terminate my parental rights joined with a suit to adopt. I do not want to be informed further about the lawsuit. I specifically agree that a final hearing in the lawsuit may be held at any time without further notice to me. I waive and give up my right to have the official court reporter make a record of the testimony in the lawsuit. Furthermore, I do ~~not~~ want to be mailed or given a copy of the judgment terminating my parental rights and do ~~not~~ want to be notified of the signing, rendition, or entry of that judgment. I also consent to have any suit affecting the parent-child relationship filed or to be filed with respect to the children named above be decided by an associate judge appointed under section 201.001 of the Texas Family Code.

"If I am in the armed services of the United States at this time, that fact in no way has interfered with my freedom to make my decision to execute this affidavit, and, insofar as this matter

JT
Affiant's initials

[14] is concerned, I waive all rights, privileges, and exemptions existing or that may hereafter exist in my favor under the Soldiers' and Sailors' Civil Relief Act of 1940, including the appointment of counsel to represent me in this case.

"I FULLY UNDERSTAND THAT I MAY NOT BE FURTHER INFORMED ABOUT THE

**TERMINATION SUIT OR ABOUT ANY OTHER
HEARINGS OR PROCEEDINGS AFFECTING THE
CHILDREN NAMED IN THIS AFFIDAVIT.**

"Termination of the parent-child relationship is in the best interest of the children. I understand that I make this termination possible by executing this affidavit.

**"I DECLARE THAT THIS AFFIDAVIT FOR
VOLUNTARY RELINQUISHMENT OF PARENTAL
RIGHTS IS AND SHALL BE IRREVOCABLE FOR
SIXTY DAYS. I FULLY UNDERSTAND THAT, IF I
CHANGE MY MIND, I CANNOT FORCE THE
MANAGING CONSERVATOR TO DESTROY,
REVOKE, OR RETURN THIS AFFIDAVIT AND
THAT I CANNOT TAKE BACK OR UNDO THIS
AFFIDAVIT IN ANY WAY DURING THIS SIXTY-
DAY PERIOD. I FURTHER UNDERSTAND THAT
MY PARENTAL RIGHTS PROBABLY WILL HAVE
ALREADY BEEN ENDED FOR ALL TIME BEFORE
THIS SIXTY-DAY PERIOD EXPIRES. I ALSO
UNDERSTAND THAT, IF MY PARENTAL RIGHTS
HAVE NOT BEEN ENDED WITHIN THIS SIXTY-
DAY PERIOD, THIS AFFIDAVIT SHALL REMAIN
IN FULL FORCE AND EFFECT UNTIL I REVOKE
IT. I FULLY UNDERSTAND THAT, AT ANY TIME
UNTIL THIS AFFIDAVIT IS REVOKED, MY
PARENTAL RIGHTS MAY BE TERMINATED FOR
ALL TIME.**

"I understand that, for any revocation to be valid, I must sign a statement before two credible witnesses and a person authorized to take oaths. A copy of the revocation must be delivered to David Rohlf at 102 East Ross, Suite A, Rockwall, Texas 75087. If I know that a termination suit based on this affidavit has been filed, I must file a copy of the revocation with the clerk of the court.

JT

Affiant's initials

[15] "I have carefully considered alternative plans for my children's future and have obtained the advice of whatever family members, friends, or other persons and professionals I feel were necessary to help me make this decision. This decision is very difficult for me to make, and under other circumstances I might have made a different decision. I know that **TAMAR¹ TELLO**, in accepting my children for adoptive placement and assuming responsibility for my children, is relying on my promise that I will not attempt to reclaim my children. I declare that I fully understand the meaning of this affidavit of relinquishment and the finality of my action in signing it, and I am signing it freely, voluntarily, and with the firm conviction that this decision is the best available alternative for my children.

"I am signing this affidavit today because I want to sign it and not because **TAMARA TELLO** or any other person or persons want me to sign it. I am signing this affidavit in the presence of the two undersigned witnesses. I am also signing this affidavit before a notary public, who has asked me under oath whether or not each and every statement in this affidavit is true and correct.

"I REALIZE THAT I SHOULD NOT SIGN THIS AFFIDAVIT FOR VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS IF THERE IS ANY THOUGHT IN MY MIND THAT I MIGHT SOMEDAY SEEK TO GAIN CUSTODY OF MY CHILDREN. AT THE TIME OF THE SIGNING OF THIS AFFIDAVIT FOR VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS, I FEEL THAT I AM PHYSICALLY AND EMOTIONALLY PREPARED TO SIGN THIS DOCUMENT. I AM NOT CURRENTLY UNDER THE INFLUENCE OF ANY SUBSTANCE AND/OR MEDICATION THAT WOULD AFFECT MY

¹ As such in original.

ABILITY TO EXECUTE THIS AFFIDAVIT.

**"I ACKNOWLEDGE THAT I AM SIGNING THIS
AFFIDAVIT FOR VOLUNTARY RELINQUISHMENT
OF PARENTAL RIGHTS MORE THAN FORTY-
EIGHT HOURS**

JT
Affiant's initials

**[16] AFTER THE BIRTH OF EACH CHILD
NAMED IN THIS DOCUMENT.**

/s/ John Thomas Tello
JOHN THOMAS TELLO, Affiant

Witnesses at request of affiant:

/s/ Judy M. Grinager
Witness
Printed name: *Judy M. Grinager*
Address: *424 Cozby Ave.*
Coppell, TX 75019

/s/ Ellyn H. Lofland
Witness
Printed name: *Ellyn Lofland*
Address: *104 W. Kaufman*
Rockwall, TX 75087

Verification

JOHN THOMAS TELLO appeared in person before me today and slated on his oath that he is the affiant, that he has read the foregoing Affidavit for Voluntary Relinquishment of Parental Rights, and that the statements contained in it are within his personal knowledge and are true and correct.

This Affidavit for Voluntary Relinquishment of Parental Rights was signed under oath before me at

10:04 a.m. on February 19, 2004 by the affiant.

/s/ Kristen L. Brody
Notary Public, State of Texas

[Circular SEAL of KRISTEN L. BRODY NOTARY
PUBLIC STATE OF TEXAS EXPIRES 03-08-2005]

JT
Affiant's initials

2004 March 5—Order of Termination

FILED FOR RECORD
ROCKWALL CO., TEXAS
04 MAR -5 PM 2:04
KAY MCDANIEL
DISTRICT CLERK
BY _____ DEPUTY

NO. 1-03-207

IN THE INTEREST OF	§	IN THE DISTRICT
	§	COURT
NICHOLAS PAUL TELLO	§	382ND JUDICIAL
AND	§	DISTRICT
SARAH ELIZABETH TELLO,		
	§	ROCKWALL COUNTY,
CHILDREN	§	TEXAS

ORDER OF TERMINATION

1. *Date of Hearing*

On this day the Court heard this case.

2. *Appearances*

Petitioner, Tamara Tello, appeared in person and through attorney of record, David B. Rohlf, and announced ready for trial.

Respondent, John Tello, waived issuance and service of citation by waiver duly filed and did not otherwise appear.

Also appearing was Buford Waldrop, appointed by the Court as guardian ad litem of the children the subject of this suit.

3. Jurisdiction

The Court, after examining the record and hearing the evidence and argument of counsel, finds that it has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

4. Jury

A jury was waived, and all questions of fact and of law were submitted to the Court.

5. Record

The record of testimony was duly reported by the court reporter for the 382nd Judicial

ORDER OF TERMINATION – Page 1 [12]

District Court.

6. Children

The Court finds that the following children are the subject of this suit:

Name: Nicholas Paul Tello

Sex: Male

Birth date: January 18, 1993

Name: Sarah Elizabeth Tello

Sex: Female

Birth date: September 19, 1994

7. Termination

The Court finds by clear and convincing evidence that John Tello has executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided for by chapter 161 of the Texas Family Code (this affidavit of relinquishment is on file).

The Court further finds by clear and convincing evidence that John Tello has engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between John Tello and the children the subject of this suit is in the best interest of the children.

IT IS THEREFORE ORDERED that the parent-child relationship between John Tello and the children the subject of this suit is terminated.

8. Managing Conservator

IT IS ORDERED that Tamara Tello is appointed Sole Managing Conservator of the children the subject of this suit, the Court finding this appointment to be in the best interest of the children.

ORDER OF TERMINATION – Page 2 [13]

9. Costs

IT IS ORDERED that costs of court are to be borne by the party who incurred them.

10. Record Sealed

IT IS ORDERED that all papers and records in this case, including the minutes of the Court, be sealed.

11. Relief Not Granted

IT IS ORDERED that all relief requested in this case and not expressly granted is denied. This is a final judgment that disposes of all claims and all parties.

SIGNED on March 5, 2004.

/s/ Brett Hall
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

LAW OFFICES OF DAVID E.
ROHLF
P.O. Box 1137
Rockwall, TX 75087
Tel: (972) 771-0054
Fax: (972) 772-9397

By: /s/ David Rohlf
David E. Rohlf
State Bar No. 17205500
Attorney for Tamara Tello

/s/ Buford Waldrop
Buford Waldrop, Guardian Ad
Litem

ORDER OF TERMINATION – Page 3

2005 January 19—Remand Order

[Note: Because Kinkeade, J.'s, insightful Order comes clearly within § 1447, no appeal was taken.]

**U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED**

**JAN 19 2005
CLERK, U.S. DISTRICT COURT
By MM
Deputy**

**FILED FOR RECORD
ROCKWALL CO., TEXAS
05 JAN 24 AM 11:13
KAY MCDANIEL
DISTRICT CLERK
BY M? DEPUTY**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**IN THE MATTER OF THE §
MARRIAGE OF TAMARA §
TELLO AND JOHN TELLO, §
AND IN THE INTEREST § CIVIL ACTION NO.
OF NICHOLAS PAUL §
TELLO AND SARAH § 3:04-CV-1354-K
ELIZABETH TELLO §**

ORDER

Before the Court is Petitioner Tamara Tello's ("Ms. Tello") Motion To Dismiss. Plaintiff's motion asks the court to remand the case, therefore the Court will construe Ms. Tello's Motion to Dismiss as a Motion to Remand. The Court determines that the relief requested

is warranted because the Court lacks subject matter jurisdiction and the Original Petition for Removal was not timely filed. For these reasons, the Court **GRANTS** the motion.

I. Background

The underlying cause of action in this case is a divorce proceeding. Ms. Tello filed her Original Petition for Divorce in state court on April 3, 2003. On June 9, 2004 the state court issued its decision concerning division of the parties' property. Respondent John Tello ("Mr. Tello") filed his Original Petition For Removal on June 21, 2004, asserting that this Court has subject matter jurisdiction over the suit because the state district court's divorce decree directs the parties to sell their community property house and divide the proceeds subject to an existing federal tax lien. Mr. Tello further asserts

Certified a true copy of an instrument
on file in my office on 1 / 21 / 05

Clerk, U.S. District Court.

Northern District of Texas

By: Michelle M? Deputy

[12] that the Court has diversity jurisdiction because Ms. Tello has allegedly moved out of state. In response, Ms. Tello timely filed her Motion to Dismiss and supporting memorandum on July 2, 2004.

The Court may grant a motion to remand to state court if it finds that removal was procedurally defective or that it lacks subject matter jurisdiction over the suit. See 28 U.S.C. § 1447(c). Having reviewed Mr. Tello's Original Petition for Removal, and Ms. Tello's Motion to Dismiss and supporting memorandum, the Court finds that it lacks subject matter jurisdiction over this divorce petition because there is neither a federal question nor diversity jurisdiction, and because Mr. Tello failed to timely file his notice of removal.

II. Lack of Subject Matter Jurisdiction

Mr. Tello wrongly asserts, in his Original Petition for Removal, that the Court has federal question jurisdiction over the divorce proceedings simply because the state court decreed that the house must be sold subject to a federal tax lien. Mr. Tello did not indicate which question of federal law is raised by the state court's order to sell his house and pay his taxes. He simply states that he does not want to sell the house, that he is appealing the tax lien, and that he would like the Court to reevaluate the division of property.

Even if the state court's order to sell the house subject to a federal tax lien raised a federal law question, the Court would still lack jurisdiction. The mere fact that a federal issue exists in a case based on a state cause of action does not automatically mean [13] that the Court has federal question jurisdiction. *Willy v. Costal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) (citing *Merrell Dow Pharms. Inc., v. Thompson*, 478 U.S. 804, 813, n.11 (1986)). In determining whether a case has federal question jurisdiction, the Court must consider the degree to which federal law is in the forefront of the case. *Id.* at 1168. Federal question jurisdiction generally exists only when a federal question is presented on the face of the complaint. *See Willy*, 855 F.2d at 1165; *See also Rivet v. Region's Bank*, 522 U.S. 470, 475 (1998). Here, the central issue in the case is the divorce, which is clearly a state law issue. The alleged federal law issue is not presented in the complaint (The Original Petition For Divorce), nor is it found somewhere in the forefront of the case, but is instead a collateral issue found in the disposition of property issued by the state court. This is exactly the kind of peripheral and remote federal law issue that does not give rise to federal question jurisdiction. *See Willy*, 855 F.2d at 1165 (citing *Merrell Dow* and noting that *Merrel Dow* defines the proper test for federal question

jurisdiction as "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.").

Mr. Tello also wrongly asserts that the Court has diversity jurisdiction over this suit. Mr. Tello alleges that Ms. Tello moved out of state during the suit. However, Ms. Tello was a Texas citizen at the outset of litigation and the existence of diversity jurisdiction is determined at the time the lawsuit is filed. *See Energy, Inc. v. GT Inc.*, 369 F.3d 873, 876 (5th Cir. 2004) (citing *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992)). Consequently, Mr. Tello has failed to establish diversity jurisdiction in this [14] case.

III. Failure to Timely File Notice of Removal

28 U.S.C. § 1446 (b) states that notice of removal of a civil action must be filed within thirty days of the defendant's receipt of the pleadings. 28 U.S.C. § 1446 (b). Mr. Tello filed his Original Petition for Removal on June 21, 2004, more than a year after Ms. Tello served him with her Original Petition for Divorce in April 2003. Because Mr. Tello failed to timely file his notice of removal pursuant to 28 U.S.C. 1446 (b), his removal procedure is defective. 28 U.S.C. § 1447 (c).

For the reasons stated above, the Court **GRANTS** Ms. Tello's motion. It is therefore, **ORDERED, ADJUDGED and DECREED** that this case is remanded to the 382nd District Court, Rockwall County, Texas.

SO ORDERED.

January 19th 2005.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

2005 February 2—Divorce Decree (House)

NO. 1-04-144

IN THE MATTER OF	§ IN THE DISTRICT
THE MARRIAGE OF	§ COURT
	§ 382ND JUDICIAL
TAMARA TELLO	§ DISTRICT
AND	§ ROCKWALL COUNTY,
JOHN TELLO	§ TEXAS

FINAL DECREE OF DIVORCE

On April 28 /s/ BH, 2004 the Court heard this case.

Appearances

Petitioner, Tamara Tello, appeared in person and through attorney of record, David E. Rohlf, and announced ready for trial.

Respondent, John Tello, appeared in person and through attorney of record, D. Brian Blessing, and announced ready for trial.

...

Provisions Dealing with Sale of Residence

IT IS FURTHER ORDERED AND DECREED that the property and all improvements located thereon and more commonly known as 9 Northcrest Circle, Rockwall, Texas, shall be sold under the following terms and conditions:

1. The parties shall list the property with a duly licensed real estate broker having sales experience in the area where the property is located, provided further that the real estate broker shall be an active member in the Multiple Listing Service.

2. The property shall be sold for a price that is mutually agreeable to Petitioner and Respondent. If Petitioner and Respondent are unable to agree on a sales

price within 45 days, on the application of either party, the property shall be sold under terms and conditions determined by a court-appointed receiver.

FINAL DECREE OF DIVORCE – Page 6 [17]

3. Respondent shall continue to make all payments of principal, interest, taxes and insurance on the property during the pendency of the sale, and Respondent shall have the exclusive right to enjoy the use and possession of the premises until closing.² All maintenance and repairs necessary to keep the property in its present condition shall be paid by Respondent.

4. The net sales proceeds (defined as the gross sales price less cost of sale and full payment of any mortgage indebtedness or liens on the property) shall be distributed as follows: one-half to Petitioner and one-half to Respondent.

...

FINAL DECREE OF DIVORCE – Page 7 [18]

...

Date of Judgment

SIGNED ON ~~June~~ Feb. 2, 2004. 2005

/s/ Brett Hall
JUDGE PRESIDING

...

FINAL DECREE OF DIVORCE – Page 8

² But see, *supra*, [D-4] n.5.

2005 September—Abstract of Judgment and Notice of Lien

[Note: This is not a court document, but is rather a part of the public records regarding property.]

Abstract of Judgment and Notice of Lien

ABSTRACT OF JUDGMENT

On 2 February 2005, in Cause No. 1-04-144, In the Matter of the Marriage of Tamara Tello and John Tello, In the District Court, 382nd Judicial District, Rockwall County, Texas, the judge presiding, Brett Hall, entered the Final Decree of Divorce. Tamara Tello is the Petitioner; John Tello, the Respondent. That Final Decree includes the following four paragraphs, pp.6-7:

Provisions Dealing with Sale of Residence

IT IS FURTHER ORDERED AND DECREED that the property and all improvements located thereon and more commonly known as 9 Northcrest Circle, Rockwall, Texas, shall be sold under the following terms and conditions:

1. The parties shall list the property with a duly licensed real estate broker having sales experience in the area where the property is located, provided further that the real estate broker shall be an active member in the Multiple Listing Service.
2. The property shall be sold for a price that is mutually agreeable to Petitioner and Respondent. If Petitioner and Respondent are unable to agree on a sales price within 45 days, on the application of either party, the property shall be sold under terms and conditions determined by a court-appointed receiver.
3. Respondent shall continue to make all payments of principal, interest, taxes and insurance on the property during the pendency of the sale, and Respondent shall

have the exclusive right to enjoy the use and possession of the premises until closing. All³ maintenance and repairs necessary to keep the property in its present condition shall be paid by Respondent.

4. The net sales proceeds (defined as the gross sales price less cost of sale and full payment of any mortgage indebtedness or liens on the property) shall be distributed as follows: one-half to Petitioner and one-half to Respondent.

PROPERTY DESCRIPTION

The property commonly known as 9 Northcrest Circle, Rockwall, Texas, has the following legal description, most recently found in the Rockwall County Real Property Records, by Transaction No. 00333299, Volume 04119, pages 264 to 267:

Northcrest Estate, Lot 9, 1.03 acres. Being a tract of land situated in ROCKWALL COUNTY, TEXAS, and being a tract of land situated in the Robert Simmons Survey, Abstract No. 192, ROCKWALL COUNTY, TEXAS, and being part of a 160 acre tract conveyed to JAMES H. CROSS of Record in Volume 46, page 11, Deed Records of ROCKWALL COUNTY, TEXAS, and being part of the 13.359 acre tract conveyed to HOFFMAN and VANDERVENDER by JAMES H. CROSS of Record in Volume 102, page 763, and also being that tract as recorded in Volume 107, page 916, Deed Records of ROCKWALL COUNTY, TEXAS and more particularly described as follows;

Beginning 432.36 feet South 0 Degrees 2 Minutes 20 Seconds West of the Northeast Corner of the HOFFMAN 13.359 acre tract, the common corner of tracts 8 and 9, a ½ inch iron stake found for corner;

Thence South 0 Degrees 2 Minutes 20 Seconds West,

³ As such in original. Should be "All."

with the East line of said 13.359 acre tract 171.9 feet to an iron stake found for corner;

Thence North 89 Degrees 57 Minutes 40 Seconds West, passing a ½ inch iron rod set on street R.O.W. at a distance of 236.62 feet and continuing in all a total distance of 266.58 feet to a "PK" nail found for corner in the centerline of Northcrest Circle (60 foot R.O.W.);

Thence South 89 Degrees 57 Minutes 40 Seconds East, passing a ½ inch iron rod set on street R.O.W. at a distance of 30.07 feet and continuing on all a total distance of 255.23 feet to the point of beginning and containing 44,830.1193 square feet or 1.0292 acres of land.

NOTICE OF LIEN

KNOW ALL MEN BY THESE PRESENTS:

On or about 8 July 2005, the mortgage company foreclosed on and sold the property commonly known as 9 Northcrest Circle, Rockwall, Texas.

BE ON NOTICE that the basis for this foreclosure is disputed in all respects. John Tello delivered a promise in discharge, territorial to this state, in an amount of one hundred fifty-six thousand (156,000) "dollars," with the Issue Date of 25 February 2005, toward the balance in Account No. 5801089030 (regarding 9 Northcrest Circle, Rockwall, Texas 75087), which account is with Chase Manhattan Mortgage Company ("Chase"). Chase never reflected that amount of discharge on this mortgage account. John Tello requested an accounting of that Account which he never received. John Tello never received any (A) communications from Chase, (B) notice of any breach triggering foreclosure, or (C) notice of any foreclosure.

John Tello disputes that Chase is so private as to have the authority to compel the form of the promise in

discharge, and that it is more than public enough to be bound by federal monetary policy, in particular the "legal tender" law, found at 31 U.S.C. § 5103. John Tello further disputes that any foreclosure without notice to him, as the sole party in possession of the premises, is unlawful on its face.

There may be additional grounds for alleging breach of that commercial agreement with Chase, including the issue of whether money or credit was loaned.

Therefore, John Tello alleges complete and irreparable breach of that mortgage agreement by Chase, an act occurring in this state, and that any sale by Chase or its agents is unlawful. Based upon that breach, John Tello asserts his claim, in rem, superior to the world, in the property commonly known as 9 Northcrest Circle, Rockwall, Texas. To protect his claim, John Tello hereby files his Notice of Lien.

VERIFICATION

state of Texas §
county of Anderson § ss. KNOW ALL MEN BY
 THESE PRESENTS

Before me, the undersigned Notary, acting territorial to Texas, personally appeared John Tello, who satisfied me as to her ⁴ identity, and who, upon administration of oath or affirmation by me, declared and deposed as follows:

I am John Tello, am least 21 years of age, and am competent to make this Affidavit. I have personal knowledge of these facts, and these facts are true and correct. I never violated "community supervision" in the first place, and I should *never* have been adjudicated, thus I should *never* have been jailed. The foregoing facts in this instrument are true and correct. In particular, I

⁴ As such in original. Should be "his."

delivered a territorial promise in discharge to Chase in late February, 2005, as described above, and I never heard a word from them from that date to this, as described above.

Further, Affiant sayeth not.

John Tello, Affiant

Signed and sworn to before me on this the _____ day of August, A.D. 2005, for which note my seal and signature.

Notary Public Signature

(seal)